Supreme Court, U.S.
FILED
APR 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

PEOPLE FOR RESPONSIBLE OMAHA URBAN DEVELOPMENT (PROUD),

Petitioner,

v.

ARMY CORPS OF ENGINEERS, NATIONAL PARK SERVICE, INTERSTATE COMMERCE COMMISSION, CONAGRA, INC., OMAHA DEVELOPMENT FOUNDATION, CITY OF OMAHA, COUNTY OF DOUGLAS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

NON-FEDERAL RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's cause of action is moot.

2. Whether the decision of the District Judge sitting as a finder of fact was so clearly wrong that the decision may be overturned by appellate standards of review.

3. Whether any of the reasons set forth in Rule 10 of the Supreme Court of the United States are present to warrant a review of this case.

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OPINIONS

Respondents accept the Opinions attached to Petitioner's Petition for Writ of Certiorari and contained in the Appendix attached thereto. Respondents also attach as an Appendix to this brief the Magistrate's Findings & Recommendations dated January 20, 1989, the District Court's Memorandum dated February 14, 1989, and the District Court's Order and Memorandum denying Motions for Temporary Restraining Order and Preliminary Injunction dated April 13, 1988 (See Appendix attached hereto).

STATEMENT OF THE CASE

This case involved a six block warehouse district located in a 113-acre redevelopment project (the "Redevelopment Project") located between the Missouri River and the center of downtown Omaha. The broad area from 10th Street on the west to the river on the east, and Douglas Street on the north to Jackson Street on the south, contain the project and its related environment. Going east to west one finds the following: the Missouri River, a federally controlled navigable river; the City's levee for flood control; the Union Pacific-Burlington Northern Railroad tracks; a large area of vacant and undeveloped land, part of which is owned by Douglas County and held for park purposes; and the former site of Jobber's Canyon located in a six-block area from 8th to 10th Streets and from Farnam to Jackson Streets.

The buildings in Jobber's Canyon, which were the subject of this litigation, originally consisted of 21 buildings, all of which have been demolished.

In January of 1988, the City of Omaha generated a Riverfront Redevelopment Plan which set forth the proposed redevelopment of separate parts of the area defined above. The plan envisioned the cooperative efforts of Douglas County, City of Omaha, Omaha Development Foundation ("ODF") and ConAgra in constructing a $280 million redevelopment project in downtown Omaha. The plan formed the basis for the Redevelopment Agreement, which represents the guidelines for the implementation of the Redevelopment Project. The Redevelopment Agreement defines the cooperative obligations of ConAgra, the City, the County, ODF and the Peter Kiewit Foundation with respect to the implementation of the Redevelopment Plan and concept. It is clear from the Redevelopment Plan and the Redevelopment Agreement that the Redevelopment Project was a local and cooperative undertaking.

In the Redevelopment Agreement, each party retained its independence to develop its separate project in a manner consistent with its legal obligations, prior commitments, and responsibility to its constituents. Nowhere in the Redevelopment Agreement does it set forth a need for or intent to obtain any federal funding or licensing. (Petitioner's Appendix, pp. 3-4). In fact, the parties to the Redevelopment Agreement testified that the Redevelopment Agreement did not call for, nor did it contemplate, federal involvement of any kind. (Petitioner's Appendix, pp. 3-4). The Redevelopment Agreement is the vehicle by

which the downtown redevelopment concept was accomplished by local political subdivisions, non-profit charitable corporations and private companies without any federal involvement or aid.

One of the projects carried out for the development was the demolition of 21 buildings located in Jobber's Canyon. The land in Jobbers Canyon was cleared and now contains a series of recently constructed buildings, owned and operated by ConAgra as its home offices.

Though the Redevelopment Agreement and Redevelopment Project did not call for nor require any federal funding or aid or permits of any kind (Petitioner's Appendix, pp. 3-4), Petitioner has attempted to prove federal involvement in connection with a flood wall located four blocks from Jobbers Canyon, a spur railroad track located one or two blocks from Jobbers Canyon and a county park, at the closest point across the street from Jobbers Canyon.

For instance, Petitioner attempted to show that a permit was needed from the United States Army Corps of Engineers since the Redevelopment Project contemplated that the City would reroute some of its own sewers. According to Petitioner's argument, since these sewers eventually lead to connections running under the levee originally built by the Corps of Engineers, a permit would be required from the Corps of Engineers before the City could reroute its own sewers. The court below affirmed findings of fact that the Corps of Engineers had no approval authority with respect to these sewers. (Petitioner's Appendix, pp. 28-31; 85-86; 115).

The Redevelopment Project also contemplated the relocation of some railroad side track to make room for additional development. Petitioner claimed that the re-routing of this railroad track would require approval from the Interstate Commerce Commission. The court below affirmed that the trial court's finding of fact that the "side hill lead" two blocks from Jobbers Canyon was an "industrial" track which could be relocated without ICC approval, and it was. (Petitioner's Appendix, pp. 26, 81; 83; 115).

Finally, Petitioner claims that the National Park Service was involved since Douglas County's park land was originally acquired partially with National Park Service money, and the park land had been converted and the contract for federal funds had been violated, among other things. The courts below affirmed findings of fact against Petitioner on all the issues relating to the park, which would require National Park Service approval for development and use of the park. (Petitioner's Appendix, pp. 31-68; 95-105; 115; Appendix attached hereto, pp. 78-112, 125-132).

Petitioner sought to enjoin demolition of warehouses in Jobbers Canyon. However, all Petitioner's claims and evidence related to places outside of Jobbers Canyon – a railroad "industrial" track; a city levee and seawall; and a county park. Petitioner sought to prove that changes in those areas under the Redevelopment Project in Omaha would trigger federal involvement and the requirement for federal control. However, even with respect to the places outside of Jobbers Canyon that Petitioner sought to establish federal control, Petitioner failed in its proof. The magistrate found, and the District Judge and Circui

Court affirmed the findings of fact that relocation of the "industrial" railroad track was not subject to I.C.C. approval (Petitioner's Appendix, pp. 26; 81; 83; 115); that the incidental changes in the City sewer system were not subject to Corps of Engineers' approval (Petitioner's Appendix, pp. 28-31; 85-86; 115); and that the development and completion of the County Park as projected was not subject to National Park Service approval. (Petitioner's Appendix, pp. 54; 115). On the basis of these findings, Petitioner has failed to lay a factual basis to present any legal issue to this Court, to say nothing of a legal issue creating a conflict between circuits or a conflict with decisions of this Court.

The profound "off-site impact issue" which Petitioner evidently seeks to raise does not exist in this case. There cannot be an off-site impact of federal inaction unless there is an on-site right for the federal government to act. The findings below are that the federal government had no control over the local action taken with respect to the railroad track, the sewers and the park.

Oblivious to the foregoing, Petitioner seeks to argue before this Court the off-site impact of the federal control, found not to exist, of the railroad track, the sewers and the park on the warehouses in Jobbers Canyon. Factually, the impact is none. Legally, it could hardly be more than that.

The National Historic Preservation Act, 16 U.S.C. § 470f ("NHPA") and the National Environmental Protection Act, 42 U.S.C. § 4332 ("NEPA") require consultation procedures and an environmental review only in the case

of a federally assisted undertaking (NHPA) or major federal action (NEPA), where the action may affect historic properties. Petitioner has pointed to nonexistent federal involvements as being federally assisted undertakings or federal actions implicating the NHPA and NEPA, despite the fact that there is no federally assisted undertaking or major federal action in connection with the activities carried out pursuant to the Redevelopment Agreement; there is no federally assisted undertaking or major federal action which in any way affects Jobber's Canyon; and there is no federally assisted undertaking or major federal action, which, if enjoined, could prevent ODF from demolishing Jobber's Canyon (which has long since occurred).

Petitioner twice requested the District Court to impose a preliminary injunction enjoining Omaha Development Foundation from demolishing Jobber's Canyon. On both occasions, the District Court denied this request (Appendix attached hereto, pp. 1-16; Petitioner's Appendix, pp. 106-107).

SUMMARY OF ARGUMENT

1. This proceeding is moot because there is no longer any case or controversy.

2. Petitioner has failed to show any facts indicating that the Redevelopment Project was a federally-assisted undertaking or major federal action implicating the NHPA or NEPA.

3. This proceeding is not proper for certiorari under U.S. Supreme Court Rule 10.

ARGUMENT

I.

MOOTNESS.

This action was instituted by Petitioner to enjoin the demolition of warehouse buildings located in a six block area in Omaha, Nebraska. The buildings have been totally demolished. As Petitioner referring to the warehouse buildings so aptly puts it: "Now nothing remains." Petition for Writ, p. 20. This case is moot.

This Court has uniformly refused to assume jurisdiction when a case is moot because no case or controversy exists under Article III of the United States Constitution. *North Carolina v. Rice*, 404 U.S. 244, 92 S. Ct. 402, 404, 30 L. Ed. 2d 413 (1971); *Hall v. Beals*, 396 U.S. 45, 90 S. Ct. 200 (1969); *Brockington v. Rhodes*, 396 U.S. 41, 90 S. Ct. 206 (1969).

The warehouse area which Petitioner sought to "save" has been completely demolished, replatted, regraded, redesigned and reconstructed into an office park consisting of five office buildings. No vestige, historical or otherwise, remains where the demolished warehouses once stood. Petitioner's action for an injunction to restrain demolition of the warehouses is moot.[1]

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[1] In two comprehensive decisions, the Magistrate found no evidentiary support for Petitioner's factual claims (Petitioner's App., pp. 1-73; Appendix attached hereto, pp. 17-114). On four occasions the District Judge found the same (Petitioner's Appendix, pp. 74-105; 106-107; Appendix attached hereto, pp. 1-16; 115-132). Similarly the Court of Appeals found

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the same (Per Curiam Opinion of Eighth Circuit Court, Petitioner's Appendix, pp. 112-15). Upon representations of counsel for Petitioner, including the National Trust for Historic Preservation, that they did not have funds for a bond, the Eighth Circuit Court granted a limited injunction without requiring Petitioner to put up a bond. (Order of Eighth Circuit Court, Petitioner's Appendix, pp. 108-109). Shortly after the Eighth Circuit Court's attention was directed to the fact that the National Trust had uncommitted assets in the amount of $18,000,000 (Omaha Development Foundation's Motion and Memorandum to Dissolve the Injunction Dated March 1, 1989, or to Require the Plaintiffs and Intervenor to Post a Sufficient Surety Bond, filed March 30, 1989, see Appendix attached hereto, p. 133), the injunction was dissolved (Order of Eighth Circuit Court, Petitioner's Appendix, pp. 110-111). Although there have been at least seven different determinations that Petitioner's cause of action below was without merit, Petitioner continues to harass Respondents. When the time to request certiorari from this Court was about to expire, counsel for The National Trust for Historic Preservation requested an extension of time to file its petition for certiorari. After The National Trust filed and received its Request for Extension, it declined to file a Petition for Certiorari (though PROUD did file its Petition). Counsel for Petitioner are well aware of decisions indicating that only federal agencies are subject to NHPA and not defendants like the City of Omaha, Douglas County, The Omaha Development Foundation and ConAgra. *Vieux Carre Property Owners, Residents and Associates, Inc. v. Brown*, 875 F.2d 453 (5th Cir. 1989); *Bywater Neighborhood Association v. Tricarico*, 879 F.2d 165 (5th Cir. 1989). However, The National Trust, by requesting the extension to file, and PROUD, by filing the present Petition, continue to harass defendants and waste local taxpayers' (Omaha and Douglas County) funds by needlessly prolonging litigation which is not only frivolous, but moot.

II.

PETITIONER FAILED TO CARRY ITS BURDEN OF PROOF BEFORE THE DISTRICT COURT.

As the decisions of the United States Magistrate and District Court indicate, Petitioner failed to show any facts indicating that the Redevelopment Project was a federally assisted undertaking or major federal action implicating the NHPA or NEPA.

Before Petitioner could have shown that the demolition of Jobbers Canyon was a federally-assisted undertaking or major federal action implicating the NHPA or NEPA, Petitioner would have had to establish factually that the demolition of Jobbers Canyon was under the control of a federal agency because it was accomplished with federal funding or would have required, prior to demolition, some federal authorization, permit or license. The District Court correctly found there was no showing of any kind on the part of Petitioner that ODF was assisted in the demolition of Jobbers Canyon by federal funds or that ODF had to obtain some sort of federal authorization, permit or license to demolish Jobbers Canyon.[2]

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[2] Petitioner has made several statements regarding agency control over the Redevelopment Project which Respondents perceive to be misstatements of law and fact. In its Petition, Petitioner claims that: (1) the federal agencies involved had approval power over the Redevelopment Project (Petition for Writ, p. i); (2) the abandonment of the Side Hill Lead and shared line agreement were subject to ICC approval (Petition for Writ, p. 12); (3) changes in the park design were subject to National Park Service approval (Petition for Writ, pp. 12-13);

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This factual determination by the District Court was upheld by the Eighth Circuit which said that none of the factual determinations made the District Court were clearly erroneous. This Court has long held that it does not grant certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 497 (1925). *See also, Houston Oil Co. of Texas v. Goodrich*, 245 U.S. 440, 38 S. Ct. 140 (1918); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 44 S. Ct. 164 (1924). Where the District Court and Circuit Court have reviewed the facts and reached the same conclusion, the Supreme Court will find no reason to review those facts itself. "A court of law, such as this Court is, rather than a court for correction of errors and fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver, Inc. & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S. Ct. 535, 538 (1949); *Bereny v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635, 87 S. Ct. 666, 670 (1967).

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and (4) sewer lines could not be relocated without Corps of Engineers' approval (Petition for Writ, p. 13). However, the Magistrate and the District Judge ruled that: (1) there was no federal agency that had approval power over the Redevelopment Project (Petitioner's Appendix, pp. 72; 93; 94; 105; Appendix attached hereto, pp. 20; 113); (2) the abandonment of the Side Hill Lead and the shared line agreement were not subject to ICC approval (Petitioner's Appendix, pp. 26; 81; 83); (3) any changes made in the Park design were not subject to National Park Service approval (Petitioner's Appendix, p. 54); and (4) the sewer lines could be relocated without the Corps of Engineers' approval (Petitioner's Appendix, pp. 28-31; 85-86).

III.

NOT PROPER FOR CERTIORARI UNDER U.S. SUPREME COURT RULE 10.

Whether a review on writ of certiorari will be granted is controlled by U.S. Supreme Court Rule 10 which states:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only *when there are special and important reasons therefor.* The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; . . .
>
> (b) . . .
>
> (c) When a . . . United States court of appeals has decided an *important question* of federal law *which has not been, but should be, settled by this Court,* or has decided a federal question *in a way that conflicts with applicable decisions of this Court.* [emphasis added]

1. No conflict of Circuit Court decisions.

Petitioner claims that the decision of the Eighth Circuit in this case conflicts with the following decisions from other circuit courts: *Morris County Trust for Historic Preservation v. Pierce,* 714 F.2d 271 (3rd Cir. 1983); *Sierra Club v. Hodel,* 848 F.2d 1068 (10th Cir. 1988); *Maryland Conservation Council v. Gilchrist,* 808 F.2d 1039 (4th Cir.

1986); *Foundation on Economic Trends v. Heckler*, 756 F.2d 143 (D.C. Cir. 1985); *Biderman v. Morton*, 497 F.2d 1141 (2nd Cir. 1974); and *WATCH v. Harris*, 603 F.2d 310 (2nd Cir. 1979).

Though Petitioner never articulates why there is a conflict between these decisions, it apparently believes that the Eighth Circuit's interpretation of the statutory term "federally-assisted undertaking" as it applies to nonfederal projects that require federal approval or licensing was too narrow as compared to these other Circuit decisions. Petitioner apparently believes that the Eighth Circuit was too restrictive when determining the extent to which federal agencies are required to consider indirect or "off-site" impacts of their actions under the NHPA and the NEPA.

Before analyzing these other Circuit decisions to show why they are entirely consistent with the Eighth Circuit's decision in this case, it is helpful to outline the general analysis developed by various circuit courts when assessing off-site impacts.

The best analysis so far of the extent to which an agency must consider off-site impacts of their actions was rendered in *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394 (9th Cir. 1989). In that case, the court said an agency should *not* draw an analogy comparing environmental impacts to ripples following the casting of a stone in a pool. To do so would suggest that the entire pool must be considered each time a substance heavier than a hair lands upon its surface. 884 F.2d at 400. The *Sylvester* Court said that a better image is that of scattered bits of a broken chain, some segments of which contain numerous

links, while others have only one or two. Each segment stands alone, but each link within each segment does not. If two separate portions of a project should be considered two links of a single chain, then the agency should consider the off-site impacts. However, if the two separate segments are not two links of a single chain, then the agency is not required to look to the off-site impact. 884 F.2d at 400.

The decision in this case, as well as previous Eighth Circuit cases, is entirely consistent with the *Sylvester* case. The Eighth Circuit previously ruled on the extent to which a federal agency must consider indirect or off-site impacts of their actions under the NHPA and NEPA. *See Winnebago Tribe of Nebraska v. Ray*, 620 F.2d 269 (8th Cir. 1980) and *Ringsred v. City of Duluth*, 828 F.2d 1305 (8th Cir. 1987). The *Winnebago* and *Ringsred* analysis is that in determining whether or not the NEPA or NHPA is implicated, one cannot look at the effect of the entire project on the environment, but only the effect of the federal portion of the project. If the federal portion of the project does not have an effect on the environment, then the Acts are not implicated. The analysis then is what portion of the project is "federal". To make this determination, the Court must study the federal agency's statutory duties to determine whether federal action is a legal condition precedent to completing the project. In both cases, the Eighth Circuit ruled that there was no federal action required which was a legal condition precedent to any portion of the project which affected the environment. These cases define the extent to which the NEPA requires compliance in a nonfederal portion of fundamentally nonfederal projects.

Respondents do not dispute the statement of Petitioner that generally nonfederal projects are considered federal actions for NEPA and NHPA purposes if they cannot "begin or continue without prior approval of a federal agency" (Petition for Writ, p. 16), or that the six purportedly "conflicting" circuit decisions stand for this proposition.[3] However, in each case where these courts have stated this proposition, the respective courts recognized that the NEPA or NHPA only applied where the activity sought to be enjoined was to be accomplished with federal funds or could not proceed forward without a federal permit or license. This is entirely different from the case at hand where ODF sought to demolish buildings it owned with its own money and did not need to obtain a federal permit to demolish such buildings.

One of the "conflicting" Circuit decisions cited by the Petitioner, *Morris County*, presents an entirely different scenario. In *Morris County*, HUD provided funds to the town of Dover, New Jersey to facilitate a redevelopment plan. Some of these funds were to be used directly for the demolition of a historic structure. Even though the funds had been disbursed prior to the demolition of the historic structure, the plaintiffs claimed HUD was still involved in the project since under the HUD loan contract, HUD still had the authority to require alteration of the plan.

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[3] Respondents do object to any implication by Petitioner that a federal court would have authority under the NEPA or NHPA to enjoin the actions of a private party when the NEPA and NHPA speak only to the actions of federal agencies. *See* Footnote 1, page 7, *supra*.

The court agreed and ruled that there was federal involvement in a project where the federal agency had authority to require alteration to the plan where such alteration would enhance the environment (NEPA) or modify its impact on historic properties (NHPA). This is an important distinction between the *Morris County* case and the present case. In *Morris County*, the federal agency could require a modification to the plan which would preserve a historic building since the demolition of the building was the subject of the HUD funding contract. In the present case, even if the National Park Service for instance could require an alteration to Douglas County's plan for acquisition and construction of the Park, such an alteration would only operate within the borders of the Park and would not reach into Jobber's Canyon which is entirely outside the Park.

The facts in *WATCH v. Harris*, 603 F.2d 310 (2nd Cir. 1979) are virtually identical to the facts in *Morris County*. In *WATCH*, HUD funds were to be used directly for the demolition of historic structures. All of the HUD funds had not yet been disbursed. As a result, HUD still had the authority to require alteration of the project before disbursing any more funds.

In *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988), county officials proposed constructing a road through federal lands. The court determined that the Bureau of Land Management was obligated, pursuant to the Federal Land Policy and Management Act, to insure that the county's construction of that road did not unnecessarily degrade the condition of the federal property. As a result, under the Federal Land Policy and Management Act, the

Bureau of Land Management had direct regulatory control over how the county constructed its road.

In *Maryland Conservation Council,* the Fourth Circuit Court ruled that the NEPA did apply where the defendant sought to construct a highway through a state park which was originally acquired partially with federal funds. It was very clear that the National Park Service would have to issue a permit before the county could construct a road through this park. Therefore, the activity sought to be enjoined could never occur without action on the part of a federal agency. The *Maryland Conservation Council* case presents an interesting comparison to the case at hand. For the case at hand to be analogous to *Maryland Conservation Council,* it would have been necessary for Jobbers Canyon, not the Douglas County Park, to have been acquired with the National Park Service funds. Under that fanciful scenario, ODF would have to obtain permission from the National Park Service to demolish buildings acquired with federal money.

In *Foundation on Economic Trends v. Heckler,* 756 F.2d 143 (D.C. Cir. 1985), the plaintiffs sought to enjoin an experiment proposed by University of California scientists to release genetically engineered organisms into the open environment. Before the scientists could release these organisms into the open environment, they first had to obtain approval from the National Institutes of Health. As a result, the scientists had to obtain a permit from the federal government to conduct this activity.

Biderman v. Morton is actually an odd case for Petitioner to cite. In that case, the plaintiffs sought to enjoin

the local municipal authorities from issuing building permits and zoning variances. The plaintiff's theory in the *Biderman* case revolved around Congress' Fire Island National Seashore Act, which authorized the appropriation of funds to condemn beachfront properties in the area of these municipalities in order to preserve the natural state of these sites. The National Park Service was to carry out these condemnations and prepared a master plan for determining which sites to acquire. The National Park Service itself determined that the preparation of the master plan constituted a major federal action and therefore undertook preparation of an environmental impact statement in conjunction with the development of the master plan. At the time the action was commenced, the National Park Service had not yet completed the environmental impact statement. As a result, the plaintiffs' claimed that the municipal authorities, which were subject to neither the Fire Island National Seashore Act nor the NEPA, could not issue any permits or zoning variances until the environmental impact statement was complete.

The Circuit Court in *Biderman* ruled that the agency's authority under the Fire Island National Seashore Act did not give that agency "go ahead" power over the zoning and permitting decisions of the municipalities. The validity and operative effect of the local zoning and permit ordinances did not depend upon any approvals to be granted by the federal agency pursuant to the Fire Island National Seashore Act. As a result, the Court ruled that the local municipalities' acts of granting construction permits and zoning variances did not trigger the NEPA, even though such acts had an obviously detrimental effect on the very environment which the Fire Island National

Seashore Act sought to protect. Similarly, ODF did not need to obtain any permits from the National Park Service, the I.C.C. or the Army Corps of Engineers to demolish Jobbers Canyon.

In all of the "conflicting" decisions cited by the Petitioner, it was the very act sought to be enjoined which the federal agency had direct regulatory control over or contributed funds to. There is no conflict between circuits. All of the circuit courts which have considered this issue have followed the same standard as the Eighth Circuit in this case.

First Circuit. In *Citizens for Responsible Area Growth v. Adams*, 680 F.2d 835 (1st Cir. 1982), land leased from an airport to build a hangar did not trigger NEPA even though the original airport facilities were federally funded. The trial court was led to believe that any expansion of the airport was enjoinable under NEPA whether or not there was federal involvement in that expansion. The circuit court vacated the injunction because "NEPA applies only to 'federal' actions" and "a project such as this one, which is not itself federally funded nor significantly bound up in a federally funded project, is not 'federal.' " 680 F.2d 835, 839. *Chick v. Hills*, 528 F.2d 445 (1st Cir. 1971), involved a tract of land that had been segmented and separated from a HUD financed project. Plaintiffs insisted that it should have been included in the project. The district court found there was no planned federal participation in the segmented portion of the project. The court of appeals affirmed saying the "plaintiffs had the burden to show that the federal government had plans to participate in future projects on excluded

segments of the parcel." The court pointed out that the question of whether a project is federal for NEPA purposes is one of fact and the district court's findings can only be set aside if they are clearly erroneous. 528 F.2d 448.

Third Circuit. In *N.A.A.C.P. v. Medical Center, Inc.*, 584 F.2d 618 (3d Cir. 1978), the existence of required ministerial approval by the Secretary of H.E.W. of capital expenditures by a private hospital did not trigger NEPA. The Secretary's Section 1122 approval action was not "major" because "(1) the agency only had ministerial responsibilities relating to the relocation plan, (2) the agency gave no direct financial aid to the project, and (3) the overall federal involvement in the project was not sufficient to turn essentially private action into federal action."

Fifth Circuit. In *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634 (5th Cir. 1983), plaintiffs filed suit to enjoin construction of a 25-mile electric transmission line along the west bank of the Mississippi River. The federal agency involved decided not to develop an impact statement. The trial court denied the injunction and the court of appeals affirmed. The court noted: "the record in this case does not show that this permitting process is sufficient to 'federalize' this action thus requiring an environmental impact statement . . . " A private act does not become a federal act, albeit a major one, merely because of some incidental federal involvement. 711 F.2d at 644, note 9. *See also Vieux Carre Property Owners, Residents & Associates, Inc. v. Brown*, 875 F.2d 453 (5th Cir. 1989) and *Save the Bay, Inc. v. United States Corps of Engineers*, 610 F.2d 322, *cert. denied*, 449 U.S. 900, 101 S.Ct. 269 (5th Cir. 1980).

Sixth Circuit. The court of appeals approved an I.C.C. authorization for merger of a railroad and a barge line. With respect to the environmental impact, the court said: "we do not believe that, in assessing the environmental impact of the merger, the Commission was obligated to assess the impact of contemplated projects which the Commission has no power to approve, which are not an inherent component of the proposed merger, and which will be subject to environmental review should they ever reach the actual proposal stage." *Crounse Corp. v. I.C.C.*, 781 F.2d 1176 (6th Cir. 1986).

Seventh Circuit. In *Edwards v. First Bank of Dundee*, 534 F.2d 1242 (7th Cir. 1976), the court concluded that a private entity could demolish a historic building it owned even though the Comptroller of Currency must approve an application by the private party to move its bank to the site of the demolished building. The court pointed out: "the Bank's project of demolishing the privately owned structure for clearance of the property to facilitate the construction of a new building is a private act over which the Comptroller has no authority, either expressed or implied . . . " 534 F.2d 1246.

Eighth Circuit. In *Ringsred v. City of Duluth*, 828 F.2d 1305 (8th Cir. 1987), a citizen sought to enjoin construction of a parking ramp next to gambling facility operated by the Indian Commission. The injunction was denied because the Secretary of Interior's actions in approving a contract between the Indians and the City concerning the parking ramp to be constructed next to bingo facility was too incidental to the parking ramp project to constitute major federal action requiring environmental assessment. The court pointed out that no federal action was a legal

condition precedent to construction of the parking lot. The court also relied on the following three factor test: (1) the degree of discretion exercised by the agency over the federal portion of the project; (2) whether the federal government has given any direct financial aid to the project; and (3) whether "the overall federal involvement with the project is sufficient to turn essentially private action into federal action." 828 F.2d at 1308. In *Winnebago Tribe of Nebraska v. Ray*, 620 F.2d 269, *cert. denied*, 449 U.S. 836, 101 S. Ct. 110 (8th Cir. 1980) and *Missouri Coalition For The Environment v. Corps of Engineers*, 866 F.2d 1025 (8th Cir. 1989), the Eighth Circuit Court of Appeals applied the same standard.

Ninth Circuit. In *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394 (9th Cir. 1989), the court reviewed recently adopted Corps of Engineers regulations relating to the segmentation of projects and concluded the broken chain rule applies. Each segment stands alone, but each link within a segment does not. The court ruled that a golf course and a resort were unconnected segments, not connected links within a segment. 884 F.2d 400.

Tenth Circuit. Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988), expresses the rule, in this manner: "The touchstone of major federal action, . . . is an agency's authority to influence significant nonfederal activity." This influence must be more than the power to give nonbinding advice to the nonfederal action.

D.C. Circuit. A permit to discharge waste requirement does not give the agency authority to regulate construction of the building from which the discharge will ultimately come. *Natural Resources Defense Council, Inc. v.*

U.S. Environmental Protection Agency, 822 F.2d 104 (D.C. Cir. 1987). The court said: "NEPA, as a procedural device, does not work a broadening of the agency's substantive powers . . . whatever action the agency chooses to take must, of course, be within its province in the first instance. In the circumstances at hand, the 'major federal action' which is subject to environmental review is the issuance of a permit to discharge pollutants; it is not the authorization of construction." 822 F.2d 129.

The circuits are unanimously agreed that the agency must have authority over some aspect of the federal portion of the project which would directly impact the nonfederal portion. In the case at hand, development of the park, relocating the railroad, and altering the sewers are not only not subject to any federal agency control, they have no bearing, immediate or remote, on ODF's demolition of the warehouses in Jobbers Canyon – which, in fact, has already occurred.

2. No conflict with applicable decisions of this Court.

Petitioner claims that certiorari should be granted pursuant to U.S. Supreme Court Rule 10.1(c) since the decision of the Eighth Circuit in this case conflicts with this Court's decisions in *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835 (1989) and *Marsh v. Oregon Natural Resources Council*, 109 S. Ct. 1851 (1989). Petitioner claims that this Court recently acknowledged the duty to consider off-site impacts and that the Eighth Circuit disregarded this doctrine. However, this case does not even share any issues with the *Robertson* and *Marsh* cases. The case for which certiorari is now sought by Petitioner dealt

with whether or not federal agencies are required to consider indirect or off-site impacts of the activities of a private developer when determining whether or not NEPA was applicable to the project. In the *Robertson* case, there was no issue as to whether or not the NEPA applied. The federal defendant in that case, the Forest Service, made its own determination that the permit it issued was a major federal action and that NEPA did apply. The issues in *Robertson* dealt with what had to be contained in the environmental impact statement after it was determined that the NEPA applied.

Therefore, there is no relationship at all between this case and the *Robertson* case, and the ruling in this case certainly does not conflict with the *Robertson* case.

Respondents cannot determine for what purpose Petitioner has cited the *Marsh* case, which only involved the activities of a federal agency (no private developer was involved) which made its own decision that the NEPA was implicated by its activities. There was no discussion of the off-site impact at all in the *Marsh* case. As a result, it is hard to imagine how the Eighth Circuit's decision in this case is at odds with the *Marsh* case.

3. No important question of federal law which has not been, but should be, settled by this Court.

Given the fact that there is no conflict concerning this issue between the various circuit courts or with this Court, there is no question of federal law, much less

important question, which has not been, but should be, settled by this Court.

4. No special or important reasons for granting writ of certiorari.

U.S. Supreme Court Rule 10.1 first and foremost requires that before review on writ of certiorari will be granted there must exist special and important reasons therefor. Generally, the importance arises out of issues affecting the public in general as distinguished from importance to the particular parties involved. See for instance, *Layne & Bowler Corporation v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422, 423 (1923) where this Court originally granted certiorari then dismissed the same despite the fact that there was a conflict in the decisions of the 5th and 9th Circuit Courts. This Court stated that it was very important that it be consistent in not granting a writ of certiorari except in cases involving principles, the settlement of which is important to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts. *See also, Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79, 75 S. Ct. 614, 619-620 (1955).

Further, though an issue may be important in the sense that it is interesting, this Court has ruled that importance implies a reach to a problem beyond the academic or the episodic. *Rice*, 349 U.S. at 74, 75 S. Ct. at 616.

In its ruling in this case, the Eighth Circuit stated that none of the Appellants' arguments persuaded the Eighth

Circuit that any of the federal defendants had the degree of de jure or de facto control over Jobbers Canyon necessary to trigger consultation procedures and environmental review under the NEPA or NHPA. Nonetheless, Petitioner claims the involvement of the federal defendants was sufficient to invoke the requirements of the NEPA and NHPA. As a result, Petitioner is simply claiming that the district court and circuit court considered the factual evidence incorrectly. However, this Court has previously stated that it does not grant certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 497 (1925). *See also, Houston Oil Co. of Texas v. Goodrich*, 245 U.S. 440, 38 S. Ct. 140 (1918); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 44 S. Ct. 164 (1924).

Where the district court and circuit court have reviewed the facts and reached the same conclusion, this Court ordinarily will find no reason to review those facts itself. "A court of law, such as this Court is, rather than a court for correction of errors and fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver, Inc. & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S. Ct. 535, 538 (1949); *Bereny v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635, 87 S. Ct. 666, 670 (1967).

CONCLUSION

The trial Court clearly acted properly as did the Eighth Circuit Court and their decisions should not be disturbed. Petitioner failed to establish any state of facts indicating that the demolition of Jobbers Canyon required or involved any federal funding, approvals, permits or licenses which might establish that the demolition of Jobbers Canyon was a federally assisted undertaking or major federal action.

Respectfully submitted,

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APPENDIX

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PEOPLE FOR RESPONSIBLE OMAHA URBAN DEVELOPMENT, et al.,	)	CV88-0-247
Plaintiffs,	)	ORDER ON MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION
vs.	)	
INTERSTATE COMMERCE COMMISSION et al.,	)	
Defendants.	)	
	)	(Filed Apr. 13, 1988)

In accordance with the memorandum of today,

IT IS ORDERED that the plaintiffs' motion for temporary restraining order and preliminary injunction, filing 6, are denied.

Dated April 13, 1988.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PEOPLE FOR RESPONSIBLE OMAHA URBAN DEVELOPMENT, et al.,	)	CV88-0-247
Plaintiffs,	)	MEMORANDUM AND ORDER ON MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION
vs.	)	
INTERSTATE COMMERCE COMMISSION et al.,	)	
Defendants.	)	
	)	(Filed April 13, 1988)

EVIDENCE

At the hearing on these motions on April 12, 1988, eighty-four documents were submitted on behalf of the plaintiffs and seven on behalf of the defendants. I declined to rule on receipt of the exhibits because of the press of time, but reserved ruling. I now make the evidentiary rulings, although the parties must understand that I have studied, at least to the extent that appeared to be necessary for a proper ruling on the motions, all the documents presented. The formal rulings are as follows:

1. these exhibits are received in evidence and the objections overruled: plaintiffs' Exhibits 8, 12, 14, 16, 17, 18, 19, 21, 27, 82, 83, and 84; and defendants' Exhibits 101, 102, 103, 104, 105, 106, and 107:

2. objections on grounds of foundation, relevancy and hearsay are sustained as to the remaining documents.

I note only briefly that the plaintiffs are correct in suggesting that there should be a looser standard at a hearing on preliminary motions than at the trial, but the standard cannot be so loose that weight is given to documents neither athenticated [sic], nor shown to have any effect on anything done or planned to be done, nor to be the product of someone having personal knowledge of the contents. Such is the nature of many of the documents offered by the plaintiffs. For example, the only support offered for Exhibits 31 through 54 is the affidavit of Mark Himes, Exhibit 82, which says:

> "These Exhibits came from three sources. One was an examination and copying by Ed Fogarty of the file of Oliver Wolf, Federal Benefits Coordinator at the State Park and Game Commission in Lincoln, Nebraska in about mid-March 1988. Other documents came during informal discovery by Ed Fogarty with County Property Director Hogan in the presence of Deputy County Attorney Henry Wendt on 4/6/88. The other documents in this group came from an examination and copying of documents by Edward F. Fogarty at the National Park Service office at Braiker-Brandeis Building, Omaha, Nebraska, on or about 4/6/88."

That gives absolutely no ground for any weight to be given to such documents. It provides neither authenticity nor a likelihood of personal knowledge of facts stated. The one case drawn to my attention by the plaintiffs' counsel is *Asseo v. Pan American Grain Co., Inc.*, 805 F.2d 23 (1st Cir. 1986). It says that a trial court committed no error in receiving as evidence for purposes of a preliminary injunction transcripts from a hearing before an administrative law judge, which were claimed on appeal to

have been hearsay but which may not have been objected to on the grounds of hearsay at the time of the hearing before the district court. The court said:

> "Affidavits and other hearsay materials are often received on preliminary injunction proceedings. The dispositive question is not their classification as hearsay but whether, weighing all the attendant factors, including the need for expedition, this type of evidence was appropriate given the character and objectives of the injunctive proceedings. . . ."

The plaintiffs also call my attention to the Notes of the Advisory Committee on Rules to the 1966 amendment of Rule 65(a)(2) which says:

> "*Subdivision(a)(2)* – This new subdivision provides express authority for consolidating the hearing of an application for preliminary injunction with a trial on the merits. The authority can be exercised with particular profit when it appears that a substantial part of the evidence offered on the application will be relevant to the merits and will be presented in such form as to qualify for admission on the trial proper."

This has to do with consolidation of the hearing on the preliminary injunction with the trial on the merits. There is no indication that any of the parties wanted a consolidation and the subject has not been discussed with the court. Suffice it to say, however, that in my judgment there is not a likelihood that can be based on anything other than pure speculation that most of the excluded exhibits would be presented at a trial in a form that would make those documents admissible. It is conceivable, of course, that information in some of the documents could be presented by live witnesses, but the

documents themselves would for the most part be inadmissible. In any event, a consideration of the substance of all those documents would not change the outcome of my ultimate ruling on the motion now before me.

I have exercised some liberality in putting into evidence some of the matters offered. For example, the deposition of Richard Niedergeses, Exhibit 84, is in evidence, although it has not been signed by the deponent, the reading and signing of the deposition have not been waived by anyone, and there was no stipulation waving any of those requirements. The affidavit of Mark Himes, Exhibit 82, also is in evidence although lacking any declaration that he has personal knowledge of the source of the documents mentioned and saying nothing that tends to establish any feature of the admissibility of the documents.

II. BACKGROUND

This action was prompted by development plans affecting the Jobbers Canyon Historic District, a six and one-quarter block warehouse district in downtown Omaha that is included in the National Register of Historic Places. On February 2, 1988, the City Council of Omaha adopted a "Riverfront Redevelopment Plan" approving a redevelopment project that includes Jobbers Canyon. On March 15, 1988, the Omaha City Council approved a redevelopment agreement between the City of Omaha, the Omaha Development Foundation (ODF), ConAgra, Inc., Douglas County, and the Peter Kiewit Foundation. Completion of the redevelopment project

will require demolition of the buildings in Jobbers Canyon. The plaintiffs allege that this demolition "will represent the largest single destruction of historic register properties in the twenty years that the National Trust for Historic Preservation has been [m]onitoring these matters." Complaint ¶ 21.

The area included in the $275 million redevelopment project is bounded by Tenth Street on the west, the Missouri River on the east, Farnam Street and Interstate 480 on the north, and Leavenworth Street on the south. Jobbers Canyon lies within the redevelopment project area between Tenth and Eighth Streets on the west and east, and Farnam and Jackson Streets on the north and south.

The plaintiffs include People for Responsible Omaha Urban Development (PROUD), a not-for-profit corporation dedicated to historic preservation, Mercer Management Company (Mercer), the "main developer" of the Old Market Historical District adjacent to Jobbers Canyon, and Roger Durand, who resides in the Old Market.

The defendants include parties to the redevelopment agreement (the City of Omaha, Douglas County, ODF, and ConAgra), the mayor of Omaha (Bernie Simon), and several federal agencies (Interstate Commerce Commission, National Park Service, Army Corps of Engineers, Federal Aviation Agency) and their heads.

The plaintiffs allege that the defendants are violating the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA) by proceeding with the redevelopment project without following the review procedures in those acts. They seek to enjoin the imminent demolition of buildings in Jobbers Canyon

pending a ruling on the merits of the case. The defendants contend that the plaintiffs lack standing to bring this action. Responding to the merits of the plaintiffs' legal argument, the defendants argue that the redevelopment project does not require the federal involvement necessary to trigger the review requirements of either NEPA or the NHPA.

II. STANDING

The power of this court to decide this matter is granted by Article III of the constitution. To ensure that federal courts assume jurisdiction only over Article III "cases and controversies," Supreme Court decisions have instructed that

> at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," . . . and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision. . . ."

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (citations omitted).

A. PROUD

PROUD's primary purpose is "advocat[ing] preservation of sites, buildings and objects of cultural and historic significance as part of responsible urban planning for the City of Omaha and to conduct public education programs through lectures, tours and publications." Complaint ¶ 1.

Of its "approximately 200 members, some . . . own property in the Old Market historic district, and some . . . reside in the Old Market and the Jobbers Canyon Historic Districts, and all . . . derive benefit from Jobbers Canyons' significance as a cultural and historic landmark." *Id.* PROUD alleges that it will suffer "injury in fact" from the defendants' noncompliance with NEPA and the NHPA. *Id.*

PROUD's allegations do not establish that it has standing to assert its own interests in this case. It has not shown how the challenged actions will injure its ability to pursue its objectives. *See Sierra Club v. Morton*, 405 U.S. 727, 735, 735 n.8 (1972) (requiring that association allege that "it or its members would be affected" in "their activities or pastimes by the . . . development"; an association must have more than an interest in a problem). Nevertheless, "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members." *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

> "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief request requires the participation of individual members in the lawsuit."

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock, 54 U.S.L.W. 4764, 4766 (U.S. June 25, 1986), quoting and reaffirming *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

The second two elements of the three-part *Hunt* test easily are satisfied in the present case. Concerning the first element, the complaint alleges that some members own land immediately adjacent to Jobbers Canyon and that some live in Jobbers Canyon or immediately adjacent. Yet, while the complaint contains generalized allegations of harm to PROUD, it says nothing about the injury to its members. *Cf. Weintraub v. Rural Electrification Administration*, 457 F. Supp. 78, 88 (M.D.Pa. 1978) (association has standing under NHPA because it alleged that "the aesthetic and cultural well-being of the area in which" its members resided "will be damaged"). PROUD, therefore, lacks standing both in its individual and representative capacities.

B. Durand

Roger Durand alleges that he resides "in the Old Market Historic District which is immediately adjacent to . . . Jobbers Canyon," and that his "use and enjoyment of the Jobbers Canyon National Historic District will be adversely affected by the actions of the Defendants. . . ." Complaint ¶ 3. His other allegations add nothing material for purposes of analyzing standing. He fails to show a relevant interest and how it might be injured by the defendants' alleged statutory noncompliance.

C. Mercer

Mercer Management Company alleges that it "owns property within the Old Market Historic District, located immediately adjacent to . . . Jobbers Canyon," and is the

"main developer of Omaha's 'Old Market'. . . ." Complaint ¶ 2. It alleges that it will suffer injury from noncompliance with NEPA and the NHPA, and that the "the destruction of Jobber[s] Canyon will change adversely the ambience of the Old Market." *Id.*

The defendants argue that the only injury alleged by Mercer is economic, not aesthetic or environmental, and that allegations only of economic injury do not bring it within the "zone of interests" protected by NEPA and the NHPA. There are at least two problems with the defendants' attack. First, their arguments are based solely on unfavorable inferences from the complaint. Mercer does not allege economic injury, and there is no basis for concluding that it is motivated solely by pecuniary interests. *See Monarch Chemical Works, Inc. v. Exon*, 452 F. Supp. 493, 499 (D. Neb. 1978), *aff'd sub nom. Monarch Chemical Works, Inc. v. Thone*, 604 F.2d 1083 (8th Cir. 1979).

Second, even assuming that Mercer's concerns largely are economic does not take it outside the zone of interests of the NEPA and the NHPA. The zone of interests requirement is a prudential principle, not an Article III limit on federal court jurisdiction. *Valley Forge*, 454 U.S. at 475. The Supreme Court recently explained that, although sometimes generally listed as a prudential consideration, zone of interests analysis primarily is applied in cases involving claims under the Administrative Procedure Act, and that "the test is most usefully understood as a gloss on the meaning of § 702." *Clarke v. Securities Industry Ass'n*, 55 U.S.L.W. 4111, 4114 n.16 (U.S. Jan. 14, 1987).

The cases cited by the defendants for the proposition that Mercer is not within the zone of interests of NEPA are distinguishable on their facts. *See Robinson v. Knebel*, 550 F.2d 422 (8th Cir. 1977); *Churchill Truck Lines, Inc. v. United States*, 533 F.2d 411 (8th Cir. 1976); *Monarch*, 452 F. Supp. 493. Similarly, I do not read *Weintraub*, 457 F. Supp. 78, to support the defendants' contention that Mercer is outside the zone of interests to be protected by the NHPA. Thus, Mercer's allegations are barely sufficient to establish that its interest in the ambiance of the Old Market will be injured by the defendants' failure to seek review of its plans for Jobbers Canyon, and that that injury is within the zone of interests protected by NEPA and the NHPA.

III. WHETHER AN INJUNCTION SHOULD ISSUE

It is the plaintiff's burden to show that it is entitled to have demolition of the buildings in Jobber's Canyon enjoined.

> Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 113 (8th Cir. 1981).

A. Harm to the Litigants

"[T]he act of demolition is irrevocable." *Boston Waterfront Residence Ass'n v. Romney*, 343 F. Supp. 89, 91 (D.Mass. 1972). The plaintiff stresses that, unless enjoined, ODF immediately will begin demolition of Jobbers Canyon, resulting in the irretrievable loss of a "historic and cultural resource," Plaintiffs' brief at 19, affecting the "ambience" of the area.

Balanced against the interests asserted by the plaintiff are the defendants' interests. Delay of the redevelopment project may result in its abandonment. Exhibit 107. ODF estimates that if the redevelopment plan is not implemented, it will incur a loss of at least $10 million. Exhibit 106. ConAgra estimates that delays will cost it approximately $8.5 million per year in product research and development revenues, $4.178 million in aggregate annual duplicate rentals, and probable loss of key personnel. Exhibit 107. The litigants on both sides assert significant interests.

B. The Public Interest

Similarly, the public interests advanced by both the plaintiff and the defendants are important. The plaintiff seeks to protect Jobbers Canyon "so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans." 16 U.S.C. § 470(b). Although omitted from the plaintiffs' assertions, the court takes notice of the strong national policy, embodied in NEPA, of environmental protection.

The defendants argue that this case illustrates the public interest in guarding the proper working of federalism so that local authorities may choose to pursue projects without federal involvement. They argue that the City of Omaha has sought for nearly two decades to develop the "blighted and undeveloped" area included in the redevelopment plan, and that it is in the interest of the city and its inhabitants that the plan not be abandoned. Defendants' brief at 40. Both the plaintiff and the defendants assert weighty public interests.

C. Probability of Success on the Merits

The National Environmental Policy Act requires that an environment impact statement be prepared for "major Federal actions significantly affecting the quality of the human environment. . . ." 42 U.S.C.A. § 4332(2)(C). "Major Federal action," as used in NEPA,

> includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27 [defining "significantly" as it applies to impact]). Actions include the circumstances where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.
>
> (a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new

> or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals. . . .
>
> (b) Federal actions tend to fail within one of the following categories:
>
> * * *
>
> (4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

40 C.F.R. § 1508.18 (1987).

There is absolutely no evidence in this case of any "major Federal actions" involved in the redevelopment plan, and all of the evidence on this point affirms that no federal involvement is contemplated. Exhibits 102-107. The defendants, therefore, have no NEPA obligations in connection with the redevelopment plan. *See Citizens for Responsible Area Growth v. Adams*, 680 F.2d 835 (1st Cir. 1982); *Ely v. Velde*, 497 F.2d 252 (4th Cir. 1974); *Biderman v. Morton*, 497 F.2d 1141 (2d Cir. 1974); *Bradford Township v. Illinois State Toll Highway Authority*, 463 F.2d 537 (7th Cir.), *cert. denied*, 409 U.S. 1047 (1972); *cf. Proetta v. Dent*, 484 F.2d 1146 (2d Cir. 1973). The plaintiff's arguments of speculative future federal involvement does not trigger the review requirements of NEPA for this redevelopment project. *See, e.g., City of Oak Creek v. Milwaukee Metropolitan Sewerage Dist.*, 576 F. Supp. 482 (E.D.Wis. 1983); *O'Brien v. Brinegar*, 379 F. Supp. 289 (D.Minn. 1974).

There is, therefore, no likelihood of success on the merits of the NEPA claim.

The National Historic Preservation Act requires that

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [and] . . . shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C.A. § 470. For purposes of the NHPA,

> "Undertaking" means any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. The project, activity, or program must be under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency. Undertakings include new and continuing projects, activities, or programs and any of their elements not previously considered under section 106.

36 C.F.R. § 800.2(o)(1987).

There is no evidence that the redevelopment project will utilize federal funds or require federal licenses or permits. The evidence on this point is to the effect that the defendants intentionally designed the plan to exclude federal involvement and that none is necessary. Exhibits 102-107. The plaintiffs efforts to argue possible and past

federal connections either are too speculative or removed. *Cf. Edwards v. First Bank of Dundee*, 534 F.2d 1242 (7th Cir. 1976); *Weintraub*, 457 F. Supp. 78 (M.D.Pa. 1978).

As with the NEPA claim, there is no likelihood of success on the merits of the plaintiff's NHPA claim. Although asserting significant harm to itself and to the public interest, the plaintiff has not shown any probability of success on the merits, thus failing to meet its burden of proving that it is entitled to the extraordinary relief sought.

Dated April 13, 1988.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PEOPLE FOR RESPONSIBLE OMAHA URBAN DEVELOPMENT, (PROUD), et al., Plaintiffs, NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES, Intervenor, vs. INTERSTATE COMMERCE COMMISSION et al., Defendants.	CV88-0-247 FINDINGS AND RECOMMENDATIONS (Filed Jan. 20, 1989)

Presented to me in my capacity as a magistrate and a court-appointed master (filing 108) for determination at trial commencing on December 5, 1988 and concluding on December 8, 1988 were the last three issues necessary for the final resolution of this case. The three questions were framed in a supplemental progression order (filing 275) and in the pretrial order (filing 429). No party appealed from the progression order issued in August of 1988, which first framed these issues:

1. whether the plaintiffs and the intervenor have standing and capacity to sue in this case,

2. whether all indispensable, proper or necessary parties have been joined in this case such that the court can provide adequate relief, and

3. whether title to the Central Park East is defective, thereby causing a conversion under the Land and Water Conservation Fund Act resulting in some basis by which the court may generally take remedial measures as to Jobbers Canyon or the Redevelopment Project. (Filing 429).

Also for resolution by me are the dispositive motions held in abeyance pursuant to my previous findings and recommendations (filing 261, part VII) submitted on July 28, 1988 (which findings and recommendations resolved all other issues except those set for trial in December or otherwise explicitly held in abeyance), and the dispositive motions asserted in connection with the December 5, 1988 trial, with respect to which I took under advisement. All evidence previously received regarding the issues described in the previous findings and recommendations (filing 261) was considered by me, pursuant to the pretrial order (filing 429), regarding the three issues tried in December of 1988. Posttrial briefs have been received, and oral argument has been heard. These findings and recommendations are considered by me to constitute findings of fact and conclusions of law interchangeably, and are not intended to modify, alter or amend the prior findings and recommendations (filing 261) except to the extent explicitly stated, if at all, in these findings and recommendations.

I.

A.

People for Responsible Urban Development ("PROUD"), Mercer Management Company ("Mercer"),

and Roger Durand, collectively referred to as the plaintiffs, filed this case on March 25, 1988. (Filings 1, 30 and 325). The plaintiffs wanted to stop the demolition of a part of downtown Omaha, Nebraska referred to as "Jobbers Canyon." Jobbers Canyon consists of about six and one-quarter square blocks and includes a number of large-scale, primarily early twentieth-century, warehouses having historic significance. Jobbers Canyon is listed on the National Register of Historic Places ("National Register"), 16 U.S.C. § 470a, by nomination of the City of Omaha, Nebraska on December 4, 1986. (Exhibits 284, 285 and 286).

The plaintiffs sued various federal defendants, including the Interstate Commerce Commission ("ICC"), the National Park Service ("Park Service"), and the Army Corps of Engineers ("Corps"), collectively referred to as the federal defendants. The plaintiffs also sued the City of Omaha ("City"), the County of Douglas, Nebraska ("County"), the Omaha Development Foundation ("ODF"), and ConAgra, Inc., collectively referred to as the nonfederal defendants. On April 13, 1988, Judge Urbom denied the plaintiffs' request for a temporary restraining order and preliminary injunction. (Filing 25).

On April 28, 1988, the National Trust for Historic Preservation in the United States ("Trust") requested leave to intervene (filing 32), asserting a position similar to that of the plaintiffs (Intervenor's Complaint, filing 32, attachment; filing 326). This request was granted on May 20, 1988. (Filing 98). The Trust should not be confused with the Advisory Council on Historic Preservation ("Advisory Council"); the Trust is a corporation created by Congress, while the Advisory Council is an independent

agency of the United States. *Compare* 16 U.S.C. § 468 *with id.* § 470i. The Advisory Council did not attempt to become a party to this litigation.

B.

About the time that Judge Urbom denied the motion for a temporary restraining order and preliminary injunction, demolition of Jobbers Canyon began. The land and buildings comprising Jobbers Canyon are under the control of or are owned by the ODF (Exhibit 202; Vol. I, TR 91:8-92:9), a private nonprofit corporation (Vol. I, TR 84:9-18). The demotion of Jobbers Canyon is a part of the implementation of a significant effort by the nonfederal defendants to revitalized downtown Omaha by, among other things, constructing a corporate office "campus" to be used by ConAgra, and developing the presently undeveloped, but dedicated, county-owned park known as "Central Park East." This proposed revitalization is generally described in the so-called Riverfront Redevelopment Plan" ("Redevelopment Plan"), (Exhibit 201), and exhaustively detailed in the "Redevelopment Agreement," (Exhibit 202). The Redevelopment Agreement was signed by all nonfederal defendants and became effective about May 3, 1988. The Agreement was not signed by the federal defendants. (Exhibit 202).

From a plain reading of the Redevelopment Agreement, and from listening to all the testimony and reading all relevant exhibits, the redevelopment project *does not intentionally or explicitly:* (a) call for the use of federal financial aid to implement the redevelopment, except to the extent that the use of Central Park East could be

characterized as using federal funds expended prior to the redevelopment project; or (b) call for the issuance of any federal licenses, permits, or approvals, except to the extent that federal licenses, permits or approvals, if subsequently required, are required as an unintended and incidental consequence of some part of the redevelopment. As stated by the nonfederal defendants in their brief, "the parties to the Riverfront Redevelopment Agreement have desired from the outset to design and implement a project totally local in character and absent federal assistance or involvement." Trial Brief of Non-Federal Defendants at 34 (Brief submitted in conjunction with the trial held an July 11, 1988 through July 14, 1988).

Jobbers Canyon is generally bounded by 8th Street, 10th Street, Farnam Street, and Jackson Street. (Exhibit 201, page 3 and figure 5). One building in the Canyon is not being demolished, but rather is being developed (Exhibit 284 (map on last page); Vol. I, TR 180:4-181:13). The ODF requires no federal approvals to demolish the Canyon, and has not and will not seek any federal assistance regarding the Canyon. (Exhibit 106). Central Park East is located to the east of Jobbers Canyon, and, when developed, will generally be described as having boundaries extending east, from the present terminus of the Central Park Mall (a previously developed park/mall not to be confused with Central Park East) at 8th Street to the Burlington Northern riverfront line, and from the north, bounded by the I-480 bridge, to the south, corresponding approximately with the extended south right-of-way line of Howard Street. (Exhibit 201, page 12, figures 5 and 6). Exhibit 1026 depicts the park concept. The ConAgra campus will not be located in Central Park East, but will

generally be located to the south and west of the park. (Exhibit 201, pages 12-13, figures 4, 5 and 6; Exhibit 202, attached exhibit 4). The park will remain a public park. (Exhibit 202). Additionally, Central Park East is not located on land where Jobbers Canyon sits.

The concept of Central Park East started in 1978 when the State of Nebraska, through the Game and Parks Commission, acting at the request of, and essentially for, the County, submitted an application, (Exhibit 217, pages 1-6; Exhibit 221), to what is now known as the Park Service for federal funds to acquire and develop park property under the Land and Water Conservation Fund Act. 16 U.S.C. § 4601-1-8. Subsequently, the application was granted on June 16, 1978, and a contract was entered into by and between the State of Nebraska and the predecessor to the Park Service. (Exhibit 217, pages 1-6).

Prior to the 1978 agreement being entered into, the predecessor of the Park Service issued a "negative declaration," indicating that the project – to acquire and develop Central Park East – would not significantly affect the quality of the environment within the meaning of the National Environmental Policy Act. (Exhibit 217, page 35). After the negative declaration was issued, the State Historic Preservation Office advised by letter on May 30, 1978 that the project had been reviewed by that office and the project would have no effect upon properties enrolled in or eligible for inclusion on the National Register. (Exhibit 217, page 26). Jobbers Canyon was considered in this 1978 review. (Vol. IV, TR 800:1-4).

The original agreement was divided into two stages: stage 1 was for acquisition, and stage 2 was for development. (Exhibit 217, pages 1-6). The application was amended six times (Exhibits 217A, 217B, 217C, 217D, 217E and 271F), and the last amendment, dated February 6, 1986, deleted stage 2. (Exhibit 217F). The County acquired the land, about 14.3 acres, with $750,000 from the LWCFA grant and other sources, and the project was "closed out" on February 19, 1986 by the Midwest Regional Office of the Park Service, indicating that the project was complete. (Exhibit 232).

The concept of Central Park East used in the instant redevelopment project includes the acquisition of additional land, without the use of federal funds, and development of the park, including the creation of a lake, without federal funds. (Exhibit 202, section 4; Exhibit 1026). The Central Park East development contemplates a park where "passive" recreation will take place. (Exhibit 202, attached exhibit 4).

The area to be redeveloped includes old railroad trackage. Relocation of one Union Pacific industrial track, the "side hill lead," will be required. (Exhibit 201, pages 7-8, 21, figure 4; Vol. II, TR 469:19-470:10; 472:1-473:16). This trackage is not located upon land where Jobbers Canyon sits.

On the easterly edge of the area to be redeveloped is the Missouri River, and adjacent to the river, on the Omaha side, is a levee system providing flood protection. (Vol. IV, TR 940:25-941:3). The ground upon which the levee is situated is owned by the City, but the levee is supervised by the Corps (Vol. IV, TR 986:5-13;

940:25-941:3), pursuant to a quite detailed operations and maintenance manual (Exhibit 293). The levee is not located upon land where Jobbers Canyon sits.

C.

Since the demolition of Jobbers Canyon threatened to make this litigation moot, the parties were placed on an expedited discovery schedule, and trial on two limited issues commenced on July 11, 1988. (Filing 104). The two issues argued at that trial were:

1. whether, based upon the then existing Riverfront Redevelopment Agreement, including all approved plans, specifications and construction drawings as of the date of trial, there was any federal funding, federal licensing or other federal involvement requiring a section 106 hearing under the National Historic Preservation Act ("NHPA") or otherwise implicating the National Environmental Policy Act ("NEPA") or the Land and Water Conservation Fund Act ("LWCFA"); and

2. if the answer to the foregoing question was in the affirmative, whether a section 106, 16 U.S.C. § 470f, hearing (or other action required under the NHPA, the NEPA or the LWCFA) could result in a federally required retention of one or more buildings in Jobbers Canyon.

I submitted findings and recommendations pursuant to the July, 1988 trial, recommending that judgment on the limited issues presented be entered for the defendants and against the plaintiffs and the intervenor. I found that the answer to the first issue was in the negative, i.e., based upon the then existing Riverfront Redevelopment

Agreement (including all approved plans, specifications, and construction drawings as of July 11, 1988), there was no federal funding, licensing or other involvement requiring a section 106 review under the NHPA, or otherwise implicating the NEPA or the LWCFA. Also, I determined that, insofar as the ODF and ConAgra are concerned, a section 106 review (or other action under the NHPA, NEPA or LWCFA) could not result in a federally required retention of one or more buildings in Jobbers Canyon. (Filing 261). The plaintiffs and the intervenor moved to reject the above findings and recommendations (Filing 268 and 269). Judge Urbom denied such motions and withheld judgment in the matter until all issues are concluded. (Filing 448).

To restate, the three remaining issues necessary for the final resolution of this case are:

1. whether the plaintiffs and the intervenor have standing and capacity to sue in this case;

2. whether all indispensable, proper or necessary parties have been joined in this case such that the court can provide adequate relief; and

3. whether title to the Central Park East is defective, thereby causing a conversion under the Land and Water Conservation Fund Act resulting in some basis by which the court may generally take remedial measures as to Jobbers Canyon or the Redevelopment Project. (Filing 429).

II.

I turn first to the issues of standing and capacity. Although closely related, the issues of standing and

capacity in my view are not the same. I believe that it may be possible for an entity to have standing under article III of the Constitution, yet not have the capacity to institute the suit. I turn then to the issues of standing and capacity. I shall briefly and generally set out the issues, and then address the issues in relation to each plaintiff and intervenor.

As to standing, as Judge Urbom observed when he denied the motion for a temporary restraining order and preliminary injunction, the power of a federal court is both granted and limited by article III of the Constitution:

> The power of this court to decide this matter is granted by Article III of the constitution. To ensure that federal courts assume jurisdiction only over Article III "cases and controversies," Supreme Court Decisions have instructed that
>
> > at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," . . . and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision. . . ."
>
> *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (citations omitted).

(Filing 25, pages 4-5).

In a general sense, the "standing" issues in this case turn on determination of whether the complaining party suffers or will likely suffer any cognizable injury by the acts

complained of in the complaint which are alleged to have been done or threatened by the defendants.

As to capacity, this issue arises with regard to the meaning and scope of the "sue and be sued" clause of the congressional enactment creating the nonprofit intervenor, the National Trust for Historic Preservation in the United States ("Trust"), 16 U.S.C. § 468c(b). The question arises in the context of the Trust's suit in this case against federal defendants and nonfederal defendants in an effort, among other things, to enforce the "anticipatory demolition" regulations of a federal agency, the Advisory Council on Historic Preservation ("Advisory Council") by forcing a so-called "section 106" consultation with the Advisory Council. *Id.* § 470f. The Intervenor's Amended Complaint for Declaratory and Injunctive Relief (filing 326) alleges in pertinent part that the Trust brings the action to require the defendants to comply with federal law including the "regulations of the Advisory Council on Historic Preservation implementing the NHPA" and seeks an injunction preventing "the defendants from undertaking anticipatory demolition within the Jobbers Canyon Historic District until defendants have complied fully with the applicable statutory and regulatory requirements." (Filing 326, page 2).

The Trust is a nonprofit corporation created by Congress, while the Advisory Council is an independent agency of the United States. *Compare id.* § 468 *with id.* § 470i. The Advisory Council did not seek to become a party to this litigation, but instead has indicated by way of affidavit received into evidence that although Congress granted it the power to litigate, *id.* § 470m(b), the Advisory Council questions its authority to sue sister federal

agencies and rather relies upon the Trust to advance in litigation the interests of Advisory Council. (Exhibit 246(23), Affidavit of John M. Fowler, General Counsel of the Advisory Council).

Specifically, the capacity issue is whether Congress has authorized the Trust to sue federal agencies and nonfederal defendants, where the Trust has no present or contemplated future interest in the buildings being demolished, save for its generalized interest in preservation of historic buildings, particularly where the Advisory Council questions whether the Advisory Council's "suit powers" extend to other federal agencies. Thus, the court should determine whether the Trust's "sue and be sued" clause must be narrowly construed to prohibit suits against federal agencies and nonfederal defendants. *See Loeffler v. Frank*, 56 U.S.L.W. 4554, 4555-56 (U.S. June 13, 1988) (broadly interpreting the "sue and be used" clause regarding the United States Postal Service); *Federal Housing Admin. v. Burr*, 309 U.S. 242, 245 (1940) (broadly interpreting the "sue and be sued" clause regarding the Federal Housing Administration).

This analysis is to be undertaken with the understanding that when Congress charters a corporation such as the Trust and authorized it to engage in business or commercial ventures with the public, and permits it to be "sue and be sued," one cannot lightly assume that restrictions on that capacity should be implied. *See Burr*, 309 U.S. at 245. Rather, if the general authority to "sue and be sued" is to be impliedly limited, one of the following must be shown: (1) certain types of suits are not consistent with the statutory or constitutional scheme; (2) an

implied restriction is necessary to avoid grave interference with the performance of a governmental function; or (3) "for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense." *Id.*

Normally, issues of standing should be dealt with at an early stage. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115 n.31 (1979). However, it sometimes remains to be seen whether the factual allegations of the complaint necessary for standing will be supported adequately by evidence at trial. *Id. See Neighborhood Dev. Corp. v. Advisory Council on Historic Preservation*, 632 F.2d 21, 24 & n.2 (6th Cir. 1989) (stating that a complaint under the National Historic Preservation Act was sufficient to withstand a motion to dismiss where "use" of the historic buildings was alleged, but the plaintiffs would be required to particularize the use at trial). Accordingly, I took under advisement the motions to dismiss and motions for summary judgment directed at the standing issues. I now recommend that said motions, both oral and written, be denied, and the issues of standing and capacity be determined on the evidence adduced at trial.

A.

Judge Urbom has not had occasion to rule with regard to the issue of standing insofar as the Trust is concerned. As to the issue of standing, the Trust claims standing for itself and as a representative of its members. I shall discuss these related standing concepts – standing for the corporation and as a representative of its members – separately.

(1)

I find that the Trust has standing for itself to assert the allegations of the Trust's amended complaint (filing 326).

The Trust has a statutory role in the implementation of the NHPA by virtue of its membership in the Advisory Council. 16 U.S.C. § 4701i(a)(8); (Exhibit 4011, 149:7-152:1-15 (Walter Deposition)). Accordingly, I believe that the Trust has demonstrated a sufficient claim of "injury in fact," causation and "redressability" to find standing.

In a similar situation, the court in *Weintraub v. Rural Electrification Admin.*, 457 F. Supp. 78 (M.D. Pa. 1978) held that a state historic preservation officer had standing to bring an action to enforce the NHPA because of the statutorily assigned role of state historic preservation officers in the designation and review process under the NHPA. *Id.* at 88. Similarly, in this case, if the consultation provision of the NHPA, 16 U.S.C. § 470f, is triggered by a finding that there is a legally significant federal involvement regarding Jobbers Canyon, then the Trust, through its chairman, 16 U.S.C. § 470i(a)(8), would be entitled to participate in a consultation designed to preserve Jobbers Canyon.

Although the Advisory Council, and therefore the Trust, does not have a veto over the destruction of historic sites as a result of the consultation, the process of consultation is the congressional means by which federal actions involving the destruction of historic sites are reconciled with national historic preservation policy. *Id.*

§ 470f. Scholars have noted that if a "plaintiff is protesting a claimed invasion of a generalized constitutional injury, the Court appears to be more reluctant to find standing . . . than in cases where the plaintiff is arguably within the zone of interests protected by a federal statute, or a statute appears to grant standing in the case." 1 R. Rotunda, J. Nowak & J. Young, *Treatise on Constitutional Law: Substance and Procedure* 129-30 (1986). Thus, the statutory remedy of consultation confers standing on an entity entitled by statute to participate in the consultation. *Weintraub*, 457 F. Supp. at 88. *See Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1037, 1039-1041 (8th Cir.1988) (holding that procedural injury may be a judicially cognizable injury in fact for standing purposes, where conversation groups claimed, among other things, that they would suffer harm in fact by increased rates of extinction of animals because the Secretary of the Interior had failed to publish regulations requiring federal agency consultation with the Secretary under the Endangered Species Act, even though the Secretary could not veto the proposed federal action as a part of the consultation under 16 U.S.C. § 1536(a)(2)).

The defendants argue that even if injury in fact and causation have been shown, I must find that all parties lack standing because I have previously found that the court would not be authorized to enjoin the purely private actions of the ODF and ConAgra (filing 261, part VI) and thus, it is argued, that the injury is not redressable by this court. If the injury is not redressable, then there is no real controversy for the court to decide and standing is lacking. However, I believe the defendants misunderstand the issue of redressability.

While I continue to believe that this court is without authority to enjoin the purely private action of the ODF and ConAgra regarding the Canyon, it does not follow that the claimed injury is not redressable by the Court. Defendants confuse the *merits* of the claim with the issue of *standing*. As I have previously stated: "Certainly, if the ODF were required to seek something, or had sought something, from a federal agency regarding the Canyon, the agency and the court would have the power to control the ODF insofar as the subject of the ODF's involvement with the agency." (Filing 261, page 73). However, I found *on the merits* that even if the ICC, the Corps of Engineers or the Park Service had to conduct a full review of the project, the agencies and therefore the court had no authority to control the purely private actions of the ODF or ConAgra. I came to this conclusion after reviewing the evidence as to what ConAgra and the ODF intended to do with the project in general and specifically the Canyon. After understanding these facts, I was able to determine that the agencies had no generalized regulatory power over the ODF and ConAgra, and that the agencies did not have specialized power to grant or withhold anything from the ODF and ConAgra regarding the Canyon because the ODF and ConAgra need not seek anything from the agencies. (Filing 261, pages 72-73). Had the facts been otherwise, the injury would have been redressable by an injunction requiring consultation prior to demolition.

The doctrine of standing "eschews evaluation of the merits," *Coalition for the Environment v. Volpe*, 504 F.2d 156, 168 (8th Cir. 1974) (referring to *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S.

669, 689 (1973)). More pointedly, our circuit has specifically held, in the face of an argument that redressability was not present, that "Congress itself has legislated the requisite causation and redressability" under the Endangered Species Act, where a private party sought injunctive relief requiring the Secretary of the Interior to publish regulations requiring federal agencies to consult with the Secretary on actions taken abroad potentially impacting upon endangered species. The court so held, (a) even though the consultation might not stop the action threatening the endangered species because the Secretary after consultation could not veto the project, (b) even where particular federal "action" agencies were not parties to the suit, and (c) even where the foreign governments would not be required to halt the proposed action by any steps taken by the Secretary or the agencies. *Defenders of Wildlife*, 851 F.2d at 1041-44. The consultation process examined in *Defenders of Wildlife* is the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2), which is very similar to the consultation process provided for in the NHPA, *id.* § 470f. The right of individuals to bring suit for enforcement of the ESA, *id.* § 1540, is somewhat similar to the "citizen suit" provisions found in the NHPA, *id* § 470w-4. Thus, for essentially the same reasons that the circuit court found the claimed injury "redressable" for standing purposes in *Defenders of Wildlife*, I find the claimed injury here redressable for standing purposes.

(2)

As Judge Urbom has observed (filing 25, pages 4-5), in this case representational, or derivative, standing,

wherein an entity asserts the interests of its members, exists where three circumstances are present: (1) the individual members would have standing to bring the action; (2) the action is germane to the purpose of the entity; and (3) neither the claim nor relief requires the participation of the individual members. *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

The Trust bases its claim to representational standing on the testimony of two persons. The testimony of George Haecker (Vol. IV, TR 1049:1-1084:17) establishes the following: he is a member of the Trust and wishes that the Trust represent him; he is an architect living in Omaha, Nebraska whose office is within three blocks of Jobbers Canyon; for some twenty years he has been involved in preserving historical sites in Omaha, Nebraska through serving on public boards such as the Nebraska Historic Preservation Board and the Omaha Landmarks Commission; he frequently tours Jobbers Canyon; he has held walking tours of Jobbers Canyon for fellow professionals and has sought consulting work with regard to buildings within Jobbers Canyon and the adjacent Old Market area; and as a professional architect, he believes that the loss of the Canyon threatens him both professionally and personally, as the Canyon is one of the most important collections of turn-of-the-century warehouses in the nation.

Likewise, the testimony of Clark Strickland (Vol. IV. TR 1084:22-1132:10) establishes the following: he is a member of the Trust and wishes that the Trust represent him; he is a historian employed by the Trust as Regional Director of the Trust; while he lives in Denver, Colorado,

he has visited Omaha, Nebraska often, both before and after this litigation, having toured Jobbers Canyon on each occasion; as a professional historian, he believes that the loss of the Canyon threatens him both professionally and personally, as the Canyon is one of the most important collections of turn-of-the-century warehouses in the nation.

Parenthetically, there is no factual dispute about the historical and architectural significance of Jobbers Canyon, as the Canyon is listed on the National Historic Register. The City of Omaha's National Register nomination form describes the reasons why the Canyon is historically and architecturally important. (Exhibit 284).

The association need not have a large number of members. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689-90 (1973) (holding that an association of five law students had standing). Not all members of the association must suffer the injury for the association to have standing; indeed, if "its members, *or any one of them*, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit," standing exists, if other elements of standing are established. *Warth*, 422 U.S. at 511 (emphasis added). *See Pesticide Pub. Policy Found. v. Village of Wauconda*, 622 F. Supp. 423, 433-34 (N.D. Ill. 1985), *aff'd*, 826 F.2d 1068 (7th Cir. 1987) (holding that one affidavit of one member was sufficient for standing, but that the association lacked standing because the individual participation of all members in the suit was required); *Action Alliance for Senior Citizens v. Shapp*, 400 F. Supp. 1208, 1213-14 (E.D. Pa. 1975) (holding that the interests of

six out of three thousand five hundred members were sufficient to provide standing for an association).

What is difficult to determine is whether the alleged "use" of Jobbers Canyon by the standing witnesses is the type of use which makes out a "distinct and palpable" injury for standing purposes when the use is threatened. *Warth*, 422 U.S. at 501. Or stated otherwise: does the "use" of Jobbers Canyon, which is comprised of privately owned buildings in which none of the witnesses claim any ownership interest nor even the legal right to touch the buildings, create a distinct and palpable injury for standing purposes, if, as here, the threatened "use," which defines the claimed injury, is essentially the ability to view the private property from a public street?

If I were to write on a clean slate, I would hold that the denial of the ability to view a privately owned, but historically significant building, from a public street, even by architects and historians having a professional interest therein, is not a "distinct and palpable" injury. *See Landmarks Preservation Council v. City of Chicago*, 1988 Ill. LEXIS 122 (Ill. Sup. Ct., Sept. 22, 1988) (holding that neither a local preservation association nor the Chicago Chapter of the American Institute of Architects, or the members of such groups, had standing under state law to claim injury based upon denial of the right to view historically significant buildings from a public street, although also holding that the Trust had standing in its own right because it was congressionally chartered to assert such interests). However, I do not write on a clean slate.

Our circuit has recognized in an environmental standing case, based upon a concession of the government, that "physical damage to a place an individual personally visits . . . is a type of injury sufficient to confer standing under Article III." *Defenders of Wildlife*, 851 F.2d at 1041. The Sixth Circuit Court of Appeals has stated the following in a NHPA case: "We do not believe that injury-in-fact is suffered only by residents of the neighborhood in which the historically and architecturally significant buildings are located. . . . [T]he [NHPA] created an interest in the preservation of architecturally and historically significant buildings to be protected by *users* of such buildings." *Neighborhood Dev. Corp.*, 632 F.2d at 24. The court also made clear its view that "[b]y alleging 'use' of the buildings' aesthetic and architectural value, plaintiffs met the *Sierra Club* standard," *id.* at 23-24, even where at least some of the threatened buildings, e.g., the Will Sales Building, were privately owned. *Id.* And in another NHPA case, a federal court found standing where a historic courthouse was threatened based, in part, upon the prior use of the courthouse by a lawyer who thus "became acquainted with the purported esthetic values of the Courthouse." *Save the Courthouse Comm. v. Lynn*, 408 F. Supp. 1323, 1332 (S.D.N.Y. 1975).

Here the court is presented with witnesses – an architect and a historian – who "use" the Canyon, albeit from the street, and whose "use" of the Canyon is sufficiently distinct from those who merely pass by the Canyon so that, according to precedent, one can fairly conclude that they have been injured in fact by the proposed demolition. I so find, and in finding so conclude that the members of the Trust would have had individual standing to

bring this action. The Trust has established that its members have or will suffer sufficient injury in fact, the challenged action may be traced to the defendants, and the challenged action may be redressed by a favorable decision. Furthermore, it is obvious that this action is "germane" to the Trust's purpose and that neither the claim nor the relief requires the participation of the individual members. Accordingly, I conclude that the Trust has representational standing.

B.

Judge Urbom found that the plaintiff known as People for Responsible Omaha Urban Development, Inc. ("PROUD"), a Nebraska nonprofit corporation, lacked standing because its institutional interests were nothing more than a generalized interest in the demolition of Jobbers Canyon, and its members would not otherwise have standing to sue in their own right. (Filing 25, pages 4-5). Specifically, Judge Urbom found:

> PROUD's primary purpose is "advocat[ing] preservation of sites, buildings and objects of cultural and historic significance as part of responsible urban planning for the City of Omaha and to conduct public education programs through lectures, tours and publications." Complaint ¶ 1. Of its "approximately 200 members, some . . . own property in the Old Market historic district, and some . . . reside in the Old Market and the Jobbers Canyon Historic Districts, and all . . . derive benefit from Jobbers Canyons' [sic] significance as a cultural and historic landmark." *Id.* PROUD alleges that it will suffer "injury in fact" from the defendants' noncompliance with NEPA and the NHPA. *Id.*

PROUD's allegations do not establish that it has standing to assert its own interests in this case. It has not shown how the challenged actions will injure its ability to pursue its objectives. *See Sierra Club v. Morton*, 405 U.S. 727, 735, 735 n.8 (1972) (requiring that association allege that "it or its members would be affected" in "their activities or pastimes by the . . . development"; an association must have more than an interest in a problem). Nevertheless, "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members." *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

> "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock, 54 U.S.L.W. 4764, 4766 (U.S. June 25, 1986), quoting and reaffirming *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

The second two elements of the three-part *Hunt* test easily are satisfied in the present case. Concerning the first element, the complaint alleges that some members own land immediately adjacent to Jobbers Canyon and that some live in Jobbers Canyon or immediately adjacent. Yet, while the complaint contains generalized allegations of harm to PROUD, it says nothing about the injury to its members. *Cf. Weintraub v. Rural Electrification Administration*, 457 F. Supp. 78, 88

> (M.D.Pa. 1978) (association had standing under NHPA because it alleged that "the aesthetic and cultural well-being of the area in which" its members resided "will be damaged"). PROUD, therefore, lacks standing both in its individual and representative capacities.

(Filing 25, pages 4-5).

Nothing changed at trial which would allow me to conclude that Judge Urbom's finding was incorrect regarding PROUD's lack of standing for itself. Specifically, unlike the Trust, PROUD can claim no statutory right to participate in the sought-after consultation. Therefore, I too find that PROUD lacks standing to maintain this action for itself.

However, PROUD did generally sharpen it's claim of representational standing at trial generally, and specifically regarding the first prong of the *Hunt* test. For example, PROUD presented the testimony of Cynthia S. Tooker (Vol. VI. TR 1215:12-1228:10), a member of PROUD and an Omaha, Nebraska architect who convinced me that she had both a personal and professional interest in the Canyon. For further example, PROUD presented the testimony of Douglas Meier (Vol VI, TR 1231:25-1268:25) a member of PROUD and an Omaha, Nebraska structural engineer with both a personal and professional interest in Jobbers Canyon. Nothing changed at trial to convince me that Judge Urbom's finding was wrong – that the second and third prongs of the *Hunt* test are satisfied insofar as PROUD's claim to representational standing is concerned. Thus, since I now find that the first prong of the *Hunt* test was satisfied by PROUD at trial, and for substantially the same reasons that I found the Trust had

representational standing to assert the interests of its members, *see* part II(A)(2) of these findings, I also find that PROUD has representational standing to assert the interests of its members.

C.

Judge Urbom found that plaintiff Roger Durand lacked standing because Mr. Durand failed to show a relevant interest in Jobbers Canyon and how that interest might be injured by the alleged noncompliance by the defendants. (Filing 25, page 5). Mr. Durand testified at trial (Vol VII, TR 1612:2-1637:14). I find that Mr. Durand presented at trial sufficient evidence to allow me to now conclude that he has standing. I shall briefly summarize his testimony as follows.

Mr. Durand is an architectural and graphic designer who has done work on buildings in the so-called "Old Market" area of Omaha, Nebraska adjacent to Jobbers Canyon, and he has lived in the area for about twenty years. Mr. Durand served the City of Omaha as a member of both the Zoning Board of Appeals and the Landmarks Heritage Commission. The Landmarks Heritage Commission exists to advise the City of Omaha on issues involving historic properties. Mr. Durand is still a member of the Commission. Mr. Durand testified that as recently as of April or May of 1988 he had completed for a client a design for a restaurant to be located in the John Deere building, which is a building situated in the Canyon. Mr. Durand frequently walks through the Canyon. Mr. Durand testified among other things that the destruction of Jobbers Canyon has injured him in that it "completely

alters the environment of [his] home." (Vol VII, TR 1625:5). He explained that he was damaged because the adjacent Old Market area in which he lived was a "National Registered district" adjacent and contiguous to the Canyon and that the destruction of the one historic district would damage the other historic district, thus damaging Mr. Durand's home apparently by changing the aesthetic environment thereof. Mr. Durand also claims injury to his business in that he will have fewer buildings available to redesign compared to what existed in the past when Jobbers Canyon and the Old Market area were intact and available for renovation. As a member of the City's Landmarks Heritage Commission, Mr. Durand has participated in hearings before the Commission and the City Council and anticipates that he would participate, if given the opportunity, in federal consultations regarding the destruction of the Canyon.

I believe that Mr. Durand has established himself as a "user" of Jobbers Canyon, whose interest in the Canyon is unique and sufficiently particular that the destruction of the Canyon will in fact cause him injury in the same sense that I believed members of the Trust would have had standing in their own right. *See* part II(A)(2) of these findings. Much like the neighbors who "used" the historic buildings in *Neighborhood Dev. Corp.*, 632 F.2d at 24, or the lawyer who used the historic courthouse in *Save the Courthouse Comm'n*, 408 F. Supp. at 1332. Mr. Durand has standing in this case.

D.

Judge Urbom found that the plaintiff Mercer Management Company, a Nebraska for-profit corporation, had alleged sufficient factual assertions to find standing, albeit only barely. (Filing 25, page 6). Judge Urbom stated:

> Mercer Management Company alleges that it "owns property within the Old Market Historic District located immediately adjacent to . . . Jobbers Canyon," and is the "main developer of Omaha's 'Old Market'. . . ." Complaint ¶2. It alleges that it will suffer injury from noncompliance with NEP and the NHPA, and that "the destruction of Jobber[s] Canyon will change adversely the ambience [sic] of the Old Market." *Id.*
>
> The defendants argue that the only injury alleged by Mercer is economic, not aesthetic or environmental, and that allegations only of economic injury do not bring it within the "zone of interests" protected by NEPA and the NHPA. There are at least two problems with the defendants' attack. First, their arguments are based solely on unfavorable inferences from the complaint. Mercer does not allege economic injury, and there is no basis for concluding that it is motivated solely by pecuniary interests. *See Monarch Chemical Works, Inc. v. Exon*, 452 F. Supp. 493, 499 (D. Neb. 1978), *aff'd sub nom. Monarch Chemical works, Inc. v. Thone*, 604 F.2d 1083 (8th Cir. 1979).
>
> Second, even assuming that Mercer's concerns largely are economic does not take it outside the zone of interests of NEPA and the NHPA. The zone of interests requirement is a prudential principle, not an Article III limit on federal court jurisdiction. *Valley Forge*, 454 U.S.

> at 475. The Supreme Court recently explained that, although sometimes generally listed as a prudential consideration, zone of interests analysis primarily is applied in cases involving claims under the Administrative Procedure Act, and that "the test is most usefully understood as a gloss on the meaning of S 702." *Clarke v. Securities Industry Ass'n*, 55 U.S.L.W. 4111, 4114 n.16 (U.S. Jan. 14, 1987).
>
> The cases cited by the defendants for the proposition that Mercer is not within the zone of interests of NEPA are distinguishable on their facts. *See Robinson v. Knebel*, 550 F.2d 422 (8th Cir. 1977); *Churchill Truck Lines, Inc. v. United States*, 533 F.2d 411 (8th Cir. 1976); *Monarch*, 452 F. Supp. 493. Similarly, I do not read *Weintraub*, 457 F.Supp. 78, to support the defendants' contention that Mercer is outside the zone of interests to be protected by the NHPA. Thus, Mercer's allegations are barely sufficient to establish that its interest in the ambiance of the Old Market will be injured by the defendants' failure to seek review of its plans for Jobbers Canyon, and that that injury is within the zone of interests protected by NEPA and the NHPA.

(Filing 25, at page 6).

The testimony at trial of Mark Mercer (Vol VI, TR 1397-1430) did not detract from Judge Urbom's initial conclusion that standing existed, and I likewise so find. (I note that Mercer may not actually "own" buildings in the Old Market area, but it does manage, under contract, certain buildings. A trust owns the buildings. This management interest is real and appears very nearly equivalent to ownership, since the shareholders of the corporation are the same as the trust beneficiaries who hold equitable title to the buildings.)

E.

Also at issue is the capacity of the Trust, a congressionally chartered corporation, to sue federal agencies and their head administrators as well as nonfederal defendants. At oral argument, I asked counsel for the federal defendants whether he was authorized to state that the United States challenged the capacity of the Trust to sue federal agencies. Counsel for the federal defendants indicated that he had explicitly inquired of the Justice Department and that he was authorized to so state. With this understanding, I turn to the issue of capacity.

As to capacity, this issue arises with regard to the meaning and scope of the "sue and be sued" clause of the congressional enactment creating the nonprofit intervenor, the Trust, 16 U.S.C. § 468c(b). The question arises in the context of the Trust's suit in this case against federal defendants and nonfederal defendants in an effort, among other things, to enforce the "anticipatory demolition" regulations of a federal agency, the Advisory Council on Historic Preservation ("Advisory Council") by forcing a so-called "section 106" consultation with the Advisory Council. *Id.* § 470f. The Intervenor's Amended Complaint for Declaratory and Injunctive Relief (filing 326) alleges in pertinent part that the Trust brings the action to require the defendants to comply with federal law including the "regulations of the Advisory Council on Historic Preservation implementing the NHPA" and seeks an injunction preventing "the defendants from undertaking anticipatory demolition within the Jobbers Canyon Historic District until defendants have complied fully with the applicable statutory and regulatory requirements." (Filling 326, page 2).

The Trust is a nonprofit corporation created by Congress, while the Advisory Council is an independent agency of the United States. *Compare id.* § 468 *with id.* § 470i. The Advisory Council did not seek to become a party to this litigation, but instead has indicated by way of affidavit received into evidence that although Congress granted it the power to litigate, *id.* § 470m(b), the Advisory Council questions its authority to sue sister federal agencies and rather relies upon the Trust to advance in litigation the interests of Advisory Council. (Exhibit 246(23), Affidavit of John M. Fowler, General Counsel for the Advisory Council)).

Specifically, the capacity issue is whether Congress authorized the Trust to sue federal agencies and nonfederal defendants, where the Trust has no present or contemplated future interest in the buildings being demolished, save for its generalized interest in preservation of historic buildings, particularly where the Advisory Council questions whether the Advisory Council's "suit powers" extend to other federal agencies. Thus, the court should determine whether the Trust's "sue and be sued" clause must be narrowly construed to prohibit suits against federal agencies and nonfederal defendants. *See Loeffler*, 56 U.S.L.W. at 4555-56 (broadly interpreting the "sue and be sued" clause regarding the United States Postal Service); *Burr*, 309 U.S. at 245 (broadly interpreting the "sue and be sued" clause regarding the Federal Housing Administration).

This analysis is to be undertaken with the understanding that when Congress charters a corporation such as the Trust and authorized it to engage in business or commercial ventures with the public, and permits it to be

"sue and be sued," one cannot lightly assume that restrictions on that capacity should be implied. *Burr*, 309 U.S. at 245. Rather, if the general authority to "sue and be sued" is to be impliedly limited, one of the following must be shown: (1) certain types of suits are not consistent with the statutory or constitutional scheme; (2) an implied restriction is necessary to avoid grave interference with the performance of a governmental function; or (3) "for other reasons it was plainly the purpose of Congress to sue the "sue and be sued" language in a narrow sense." *Id.*

I find and conclude that the Trust does not have the capacity to sue the federal defendants in this case because the "sue and be sued" clause of the Trust must be narrowly construed in order to avoid grave interference with significant governmental functions and because this type of suit which seeks to force consultation by federal agencies with the Advisory Council is not consistent with the statutory scheme creating the Trust. I conclude that the Trust has the capacity to sue the nonfederal defendants in this case because there has been no showing that such a suit is inconsistent with the statutory scheme establishing the Trust, that such a suit against nonfederal defendants would interfere with a significant federal governmental interest, or that there are other reasons why Congress plainly used the "sue and be sued" clause in a narrow fashion as it regards the nonfederal defendants.

(1)

In this case the Trust has sued the following federal defendants: the Interstate Commerce Commission,

Heather J. Gradison (Chairman of the Interstate Commerce Commission), the United States Army Corps of Engineers, John O. Marsh, Jr. (Secretary of the Army), the National Park Service, and Donald P. Hodel (Secretary of the United States Department of the Interior). (Filing 326). As pointed out above, among other things, what the Trust hopes to accomplish is to prohibit the anticipatory demolition of Jobbers Canyon prior to the federal defendants being forced to consult with the Advisory Council pursuant to 16 U.S.C. § 470f. 16 U.S.C. § 470f provides:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of the Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470v of this title a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C. § 470f.

The Trust has not claimed and has presented no evidence to indicate that it has or will have in the future any contract, lease, loan or grant involving Jobbers Canyon, any ownership interest in Jobbers Canyon, or any other ascertainable interest in Jobbers Canyon from which it might be concluded that any proprietary or economic interest of the Trust is threatened. Thus, there is

no question presented here that the property or funds of the Trust, some of which are provided by Congress, *see e.g., id.* § 470a(d)(2), are threatened by the federal defendants. This, then, is not a case where a historic property in which the Trust has a monetary interest is threatened by any act or omission of a federal defendant. Understanding what this case is not about, one may look to how the governmental interest will be adversely and significantly impacted if the Trust's "sue and be sued" clause is interpreted to allow it to sue federal agencies to force consultation with the Advisory Council.

(a)

It is important to understand the legislative history of the Trust, and the relationship of the Trust with other federal instrumentalities, most particularly the Secretary of the Interior, the Attorney General, and the Advisory Council. What follows then is an analysis of the legislative history of the Trust, historic preservation law in relation to the consultation process, and the part each relevant federal entity plays in our national policy respecting historic preservation.

The Trust is a nonprofit corporation, 16 U.S.C. § 468, with the power "[t]o sue and be sued," *id.* § 468c(b), "[t]o the extent necessary to enable it to carry out the *functions* vested in it by sections 468 to 468e [of title 16 of the United States Code]." *Id.* § 468c (emphasis added). The *functions* of the Trust are expressed in only one place, 16 U.S.C. § 468:

> The purposes of the National Trust shall be to receive donations of sites, buildings, and objects

> significant in American history and culture, to *preserve and administer them* for public benefit, to accept, hold, and administer gifts of money, securities, or other property of whatsoever character for the purpose of carrying out the *preservation program*, and to execute *such other functions* as are vested in it by sections 468 to 468e of this title.

Id. § 468 (emphasis added).

16 U.S.C. § 468a establishes a principal place of office for the Trust. 16 U.S.C. § 468b establishes the board of trustees for the Trust, which includes the Secretary of the Interior and the Attorney General as ex officio trustees. 16 U.S.C. § 468c describes the powers and duties of the Trust, without expanding the "functions." 16 U.S.C. § 468d authorizes the Trust to consult with the Advisory Board on National Parks, Historic Sites, Buildings, and Monuments (which is not the Advisory Council). 16 U.S.C. § 468e has been repealed. The only description of "functions," therefore, occurs in 16 U.S.C. § 468.

The "preservation program" referred to at the end of section 468 appears to refer to the word "preserve" in the beginning of the statute. This is because the word "them" is a pronoun referring to the nearest antecedent nouns with which it agrees in gender and number, to wit: "sites, buildings and objects significant in American history and culture." *Id.* § 468. It would appear generally therefore that the *functions* of the Trust are, at least primarily, intended to serve the goal of preservation of historic sites by acquisition, lease, contract, loan or the like. Indeed the only place in the statute describing the Trust's powers where federal agencies are mentioned authorizes the

Trust, not to litigate, but to "contract and make cooperative agreements" with such agencies. *Id.* § 468c(g).

The statute is simply incapable of being plainly read to suggest that the Trust may sue federal agencies for the purposes of forcing a section 106 consultation and enforcing a regulation promulgated by the Advisory Council, particularly when the Trust has not acquired, and will not in the future acquire, directly or indirectly by gift, purchase, contract, loan, or otherwise, an interest in the property to which the regulation is said to apply.

The legislative history of 16 U.S.C. §§ 468 through 468e, developed between 1949, when the Trust was created, to the present, affords not the slightest suggestion that Congress intended that Trust to have the power to sue federal agencies in cases such as this. The bill which became the act creating the Trust, House Report 5170, was originally proposed in the form of House Report 4671. In explaining the purpose of the Trust as one consisting of acquiring and managing historic properties, the following was stated in the Senate and House Reports accompanying House Report 5170:

> The purpose of this bill is to supplement the Federal program for the preservation of important historic sites and buildings of America . . . .
>
> . . . .
>
> Many of these historic sites and landmarks . . . are worthy of preservation and commemoration. The Federal Government, however, cannot afford to assume this responsibility for more than a limited number of places of major national importance. . . .

> . . . Realizing that the Federal Government cannot do the whole job, and that the work of the many local preservation organizations needed to be coordinated and encouraged on a national scale, they vigorously support the establishment of a National Trust for this purpose.

H.R. Rep. No. 855, 81st Cong., 1st Sess., *reprinted in* 1949 U.S. Code Cong. & Admin. News 2285, 2285-86.

Included in House Report 855 and Senate Report 1110 is a report from the Department of the Interior to the Chairman of the House Committee on Public Lands both recommending the passage of and suggesting revisions to House Report 4671. (The suggested amendments were incorporated into anew draft of the bill, House Report 5170.) The report from the Department of the Interior further supports the description of the role of the Trust as one encompassing a managing and coordinating function, not a litigation function against federal agencies:

> Since the Federal Government obviously cannot take over all the historic sites and buildings proposed for preservation, there is need for a national organization supported by non-Federal funds and devoted to the coordination of the many diverse interests in this field and specifically to the preservation of properties which the Federal Government or other organizations cannot conserve. . . .
>
> . . . .
>
> The proposed National Trust for Historic Preservation in the United States will supplement the Federal program of preservation established by the Historic Sites Act of 1935. It will mobilize and coordinate public interest and participation in the preservation of sites and buildings from voluntary resources. It will fill the gap

> in the present system of Federal legislation in this field and will establish a systematic and orderly means of receiving and handling bequests, donations, and gifts which no existing legislation is adequate to do.

Id. at 2287-88 (Letter from J. A. Krug, Secretary of the Interior, to Hon. J. Hardin Peterson, Chairman, Committee on Public Lands, House of Representatives (June 14, 1949)).

It appears inconceivable that the Secretary of the Interior would have supported legislation that authorized a federally chartered corporation to sue his agency or other federal agencies without even mentioning such possibility in his formal presentation to Congress. This is particularly true when one understands that the Secretary of the Interior and the Attorney General are designated ex officio trustees.

Since the enactment of the statute creating the Trust in 1949 there have been virtually no relevant changes in the statutory framework which created the Trust. However, Congress has continued to intertwine the workings of the Trust with federal agencies in an apparent effort to promote cooperation, not litigation. And, when Congress considered litigation between federal entities, it did so carefully and explicitly.

In 1966 Congress authorized the Secretary of the Interior to make matching grants-in-aid to the Trust for "the purposes of carrying out the responsibilities of the National Trust." 16 U.S.C. § 470a(d)(2). Nowhere is there the slightest indication that Congress intended that Trust to be able to sue federal agencies when it considered this

grant legislation. On the contrary, the statute now provides that "[n]o part of any grant made under this section may be used to compensate any person intervening in any proceedings under this subchapter." *Id.* § 470(e). Moreover, it is the Secretary of the Interior, not the Trust, who in 1966 was authorized to maintain the National Register of Historic Places. *Id.* § 470(a)(1)(A).

In 1966, no indication whatever was expressed by Congress or the administration that either branch of government thought it necessary or proper for the Trust to litigate with federal agencies. Once again, the Secretary of the Interior, in a letter to the Speaker of the House, supported the bill assisting the Trust, specifically indicating his support for matching grants to the Trust. H.R. Rep. No. 1916, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Admin. News 3307, 3312-14 (Letter from Stewart L. Udall, Secretary of the Interior, to Hon. John W. McCormack, Speaker of the House of Representatives (Mar. 2, 1966)). The Secretary thought it important to fund such grants, with no mention of litigation on the national level against federal agencies, "to encourage on an accelerated basis the local initiative and support that is needed for preservation of our historic heritage." *Id.* at 1313.

At the same time that Congress was considering matching grants to the Trust, Congress was also considering the creation of the Advisory Council which would have the authority to consult with other federal agencies on undertaking impacting upon historic properties. *Id.* at 3307-11. *See* National Historic Preservation Act, Pub. L. No. 89-665, tit. I, § 106, 80 Stat. 915, 917 (1966) (codified as amended at 16 U.S.C. § 470f). *See also* National Historic

Preservation Act, Pub. L. No. 89-665, § 201, 80 Stat. 915, 917-18 (1966) (codified as amended at 16 U.S.C. § 470i). It is this consultation process, or so-called "section 106 review," which is at the heart of this lawsuit. National Historic Preservation Act, Pub. L. No. 89-665, § 106, 80 Stat. 915, 917 (1966) (codified as amended at 16 U.S.C. § 470f). It was clear when Congress adopted this legislation that Congress intended a cooperative spirit to exist between federal entities.

For example, Congress struck from the legislation powers that the Advisory Council would have had to hold hearings under oath, to compel testimony or production of records and generally reduced the power of the Advisory Council "to conform to the purposes for which it is being created – namely to perform advisory functions." H.R. Rep. No. 1916, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Admin, News 3307, 3310-11. The House report also indicated that it recognized the need for "a high degree of cooperation"; the house committee felt that "it has provided a means of avoiding conflicts and administrative jurisdiction" and "that the national historic preservation effort should continue to be, as it has in the past, a function of the Department of the Interior." at 3310. In an apparent effort to promote cooperation, the statute named, among others, the Secretary of the Interior, the Chairman of the Trust and the Attorney General as members of the Advisory Council. Pub. L. No. 89-665, tit. II, § 201, 80 Stat. 915, 917-18 (1966) (codified as amended at 16 U.S.C. § 470i). The Advisory Council was given no authority to sue in court in 1966. Pub. L. No. 89-665, tit. II, § 205, 80 Stat. 915, 919 (1966) (codified as amended at 16 U.S.C. § 470m).

By 1976, Congress recognized the need to avoid conflicts of interest within the Advisory Council, particularly when the Advisory Council was required to deal with the Secretary of the Interior. So Congress did three things. First, it allowed the Advisory Council to appoint its own Executive Director, as opposed to using the Director of the National Park Service as the Director. Second, it allowed the Advisory Council to hire its own legal counsel, as opposed to hiring its own legal counsel who was then required to report to the Solicitor of the Department of the Interior. Third, it treated the Advisory Council as an independent executive agency of the United States for budget purposes, and not as an agency which was required to seek funding through the Department of the Interior. S. Rep. No. 94-367, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Admin. News 2442, 2448-51 (Explanation of Amendments, Amendment 3); Pub L. No. 94-422, tit. II, §§ 201 & 205, 90 Stat. 1313, 1320-21 (1966) (codified as amended at 16 U.S.C. §§ 470i & 470m).

Thus, in 1976, for the first time Congress clarified that the Advisory Council was to have litigation authority by providing in part that "[t]he Council shall have a General Counsel . . . to . . . represent the Council in courts of law whenever appropriate, [and to] assist the Department of Justice in handling litigation concerning the Council in courts of law." Pub. L. No. 94-422, tit. II, § 205, 90 Stat. 1313, 1321 (1966) (codified as amended at 16 U.S.C. § 470m). Congress continued to leave the Secretary of the Interior, the Attorney General, and the Chairman of the Trust, among others, as members of the Advisory Council. *Id.* at 1320.

In 1980, Congress for the first time recognized that the Advisory Council might have to sue another agency, and if this was necessary the Council would not be able to use the services of the Justice Department. In commenting upon the Amendments to Title II of the National Historic Preservation Act, Public Law 96-515, House Report 96-1457 provides:

> Section 301(1) clarifies the existing authority of the Council to institute legal proceedings on its own to ensure compliance with the Act. Specifically added is language that refers to the enforcement of agreements with Federal agencies under Section 106, other authorities contained in this Act and implementing regulation. In most instances it is expected that the Council will utilize the Services of the Department of Justice with regard to litigation. However, it is recognized that situations may arise where a Federal agency may violate the provisions of this Act and the only recourse is initiation of legal proceedings by the Council in its own name.

H.R. Rep. No. 96-1457, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 6378, 6405.

Public Law 96-515, tit. III, § 301(i), 94 Stat. 2998, 2999 (1980), now essentially 16 U.S.C. § 470m(b), provided the following litigation authority:

> The Council shall have a General Counsel, who shall be appointed by the Executive Director. The General Counsel shall report directly to the Executive Director and serves as the Council's legal advisor. The Executive Director shall appoint such other attorneys as may be necessary to assist the General Counsel, represent the Council in courts of law whenever appropriate, including enforcement of agreements to Federal

> agencies to which the Council is a party, assist the Department of Justice in handling litigation concerning the Council in courts of law, and perform such other legal duties and functions as the Executive Director and the Council may direct.

Pub. L. No. 96-515, tit. III, § 301(i), 94 Stat. 2987, 2999 (1980) (amending Pub. L. No. 89-665, tit. II, § 205, 80 Stat. 915, 919 (1966)) (codified as amended at 16 U.S.C. § 470m).

At the same time that Congress recognized that the Advisory Council might have to sue the federal agency, Congress deleted the Attorney General from the membership of the Advisory Council. Pub. L. No. 96-515, tit. III, § 301(a), 94 Stat. 2998 (1980) (codified as amended at 16 U.S.C. § 470i). Yet, Congress allowed the Secretary of the Interior and the Chairman of the Trust to remain as members of the Advisory Council. *Id.* And Congress further expanded the role of the Secretary of the Interior. First, to "assist the Council" the Secretary, upon request of the Chairman of the Council, was authorized, in essence, to consult by report to the Council about the significance of a particular historic property, the estimated impact of a proposed undertaking on the property, and measures which would avoid, minimize or mitigate jeopardy. Pub. L. No. 96-515, tit. III, § 302(a), 94 Stat. 2987, 3000 (1980) (codified as amended at 16 U.S.C. § 470u). The purpose of this amendment was to insure that the Council's public interest determination was aided by the professional assistance supplied by the Secretary. H.R. Rep. No. 96-1457, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 6378, 6406. Second, Congress allowed the Council, with the concurrence of

the Secretary, to exempt categories of federal programs from section 106 review. Pub. L. No. 96-515, tit. III, § 302(a), 94 Stat. 2987, 3000 (1980) (codified at 16 U.S.C. § 470v).

(b)

With the foregoing background in mind, it is evident that Congress has carefully crafted a statutory scheme which depends upon a close degree of cooperation between federal agencies and instrumentalities to function effectively. Let me be specific.

The Trust was created generally to foster public participation in the formulation and implementation of national historic preservation policy. Quite clearly, Congress did not intend for the Trust to be independent from other federal instrumentalities, as Congress provided that the Secretary of the Interior and the Attorney General, among other federal representatives, would serve as trustees. From the time of the creation of the Trust to the present, the legislation and legislative history cannot be read to explicitly authorize the Trust to take on an adversarial relationship with federal agencies or instrumentalities.

The Advisory Council was created and evolved to serve as an independent agency with the mission, among other things, to advise the executive branch, through the section 106 process, of information pertinent to particular federal undertakings having the potential of impacting historic properties. The work of the Advisory Council is premised upon receiving the unbiased input of its members, which members include the Secretary of the Interior

as well as the Chairman of the Trust. The litigation authority of the Advisory Council was carefully drafted by Congress with the presumption that in most cases the Advisory Council would be represented by the Justice Department, and only in unusual cases would the Advisory Council proceed to litigate against federal agencies using independent counsel. It thus does not appear coincidental that at the same time that the Advisory Council received explicit Congressional authority to litigate against federal instrumentalities, that Congress removed the Attorney General as a member of the Council.

The Secretary of the Interior has historically been viewed by Congress as playing a pivotal role in the formulation and implementation of historic preservation policy. The Secretary serves as a Trustee of the Trust and as a member of the Advisory Council. The Secretary is authorized to make grants to the Trust independent of the Secretary's role as a trustee. The Secretary is authorized to provide professional advice to the Advisory Council independent of his role as a member of the Advisory Council.

The Assistant United States Attorney for the District of Nebraska has been authorized by the Justice Department to challenge the capacity of the Trust to sue federal agencies, including the Secretary of the Interior. The Advisory Council has advised that despite its litigation authority it has never sued a federal agency, but instead relies upon the Trust to litigate with federal agencies. Mr. Fowler, the General Counsel of the Advisory Council, stated in his affidavit:

> 3. In my capacity as General Counsel, I have been directly involved in decision-making with

> regard to whether the Advisory Council should initiate litigation. Although the Advisory Council is independently authorized by statute to bring suit, 16 U.S.C. § 470m(b), this authority has never been exercised. It is the interpretation of the Department of Justice that this authority does not enable the Advisory Council to bring suit against other Federal agencies. As a matter of comity wit the Justice Department, the Advisory Council has refrained from attempting to exercise its litigating authority. Also, the Advisory Council does not have the staff resources to engage directly in litigation.
>
> 4. Because of these practical limitations on the Advisory Council's enforcement capabilities, the Advisory Council has recognized that the National Trust for Historic Preservation, as a statutory member of the Advisory Council, advances the interest of the Advisory Council through the execution of litigation to ensure that Federal agencies are in full and proper compliance with their obligations under Section 106 of the National Historic Preservation Act (U.S.C. § 470f).

(Exhibit 246(23) (Affidavit of John M. Fowler, General Counsel for the Advisory Council), paragraphs 3 &4). Yet, as will be seen later, the President of the Trust denies that the Trust serves as the litigating arm of the Advisory Council, and as a statutory member of the Advisory Council testifies that neither the Trust nor the Council has viewed the Trust in such vein.

It is this tension, evidenced by the controversy surrounding Mr. Fowler's affidavit, created by this lawsuit between important players in the implementation of national historic preservation policy, which forces me to

conclude that the Trust's authority to litigate against federal agencies in an effort to force a section 106 consultation must be denied. I turn now to my specific reasons.

As to the impact of this suit on the Trust, if the Trust were allowed to sue in this case, the Trust would be suing, among others, the Secretary of the Interior, a statutory member of the Trust who would be represented by an Assistant United States Attorney, who is in turn a representative of another statutory member of the Trust, the Attorney General. The testimony in this case is that a representative of the Attorney General attends the meetings of the trustees of the Trust from "sporadically" to "frequently," while the attendance record of representatives of the Secretary of Interior is very good. (Exhibit 4011 (Deposition of J. Jackson Walter, President of the Trust), 21:8-22-23:1-8). Thus, it is apparent that not only as a matter of law, but as a matter of fact, the Attorney General and the Secretary of the Interior, at least through their representatives, participate in the affairs of the Trust. Therefore, the practical impact of a suit such as this is to place two statutory members of the Trust and the Trust in an adversarial position and renders these statutory trustees unable to fulfill their statutory roles with the Trust at least insofar as the issues of this case are concerned. This is no slight impediment to the Congressional scheme that Congress created for the management of the Trust, since the Secretary and the Attorney General constitute two of the three "public" trustees, with the third being the Director of the National Gallery of Art. 16 U.S.C. § 468b.

At this juncture, it is important to realize that the President of the Trust, educated as lawyer, does not in

any way agree that the Trust should be allowed to sue because of the views of Mr. Fowler, the General Counsel of the Advisory Council, that the Trust is somehow a litigation surrogate for the Advisory Council. (Exhibit 246(23) (Affidavit of John M. Fowler, General Counsel for the Advisory Council). Indeed, the President of the Trust, as a member of the Advisory Council, denied any knowledge that the Advisory Council had a policy that recognized that Trust as the litigating arm of the Advisory Council. He was in fact upset by Mr. Fowler's suggestion, despite the fact that the Trust's lawyers offered the affidavit in support of the Trust's request to intervene in this case:

Q: Would you please read that affidavit of John Fowler.

A: . . . All right, sir.

Q. Have you ever seen that affidavit?

A: I have, yes.

Q: Pardon?

A: Yes.

Q: Fine. Was that affidavit ever furnished to the Board of Trustees?

A: I don't believe so. Not – not to my knowledge.

Q: That affidavit discusses the fact that the advisory council in "4." because of the comity agreement between the Attorney General and other government agencies they are not going to sue each other.

Where you aware of any written document reflecting that?

A: No, I certainly was not.

Q: Did you ever hear of that before?

A: In fact, but not in any kind of written form nor–

Mr. Fowler here refers to the so-called interpretation of the department as a blanket interpretation and I certainly wasn't aware of that until I saw this affidavit.

I frankly find it mistaken, out of place, and wrong. But that is my opinion. It doesn't matter too much.

Q: At least you are not aware of it. You haven't accepted it and you haven't adopted it as if it was an existing policy?

A: Certainly not.

Q: And the trustees have not adopted it as though it is an existing policy?

A: Certainly not.

Q: Would you read "4."

A: Yes.

Q: "Because of these practical limitations on the Advisory Council's enforcement capabilities, the Advisory Council has recognized that the National Trust for Historic Preservation, as a statutory member of the Advisory Council advances the interest of the Advisory Council through the execution of litigation to ensure that federal agencies are in full and proper compliance with their obligations under section 106 . . . "

A: That is what it says.

Q: Were you aware that the Advisory Council took that position?

A: I wasn't, and I am still not.

Q: All right –

A: I see what Mr. Fowler says but I don't think that is –

I am a member, the National Trust – as the delegate of the Chairman of the Board. If you will recall the Chairman of the Board is the statutory member of the Advisory Council.

Q: Yes.

A: Chairman of the Board of the National Trust. And I am delegated – I am his designee. I have been attending the meetings of this Advisory Council over the past several years.

And I am not aware that this theory has ever been in any formal way a policy of the Advisory Council. I read this with some amazement, if I may say.

Q: Well, as a member of the Advisory Council do you think the statements are false?

A: False? No.

I think it is the case that the National Trust litigation program advances the interests of historic preservation, and I suppose that means "of the Advisory Council."

I don't know what the phrase "the Advisory Council has recognized" – what that means. I am not aware of any recognition. I don't know how it would do that except by somehow –

How they would recognize that, I am not sure. But I am not aware of any kind of corporate action on the part of the Advisory Council that recognizes anything about the National Trusts's efforts in litigation.

Q: Okay, you are not aware of that.

A: Certainly not.

Q: And in any event no such authority was ever presented to the Board that the National Trust would act on behalf of the Advisory Council –

A: No.

Q: – To litigate –

A: Your statement is correct.

Q: So that whatever is meant in there it is nothing that has ever been approved or adopted or accepted by the Board of Trustees.

A: Of the National Trust.

Q: Yes, sir.

A: That is true.

Q: And it has never been approved or adopted by the Advisory Council.

A: Not to my knowledge.

Q: You are a member of the Advisory Council.

A: Yes, I am.

Q: When did you first become aware of that affidavit?

A: In terms of reading it, within the last week or ten days.

In terms of knowing that it existed – I have known that Mr. Fowler gave a deposition in this case I suspect since more or less about the time that he did it. Although – it is the 13th of May. I don't think I knew it that soon. But I knew he was going to speak in this matter.

This is an issue, as I suspect you can tell from my tone, of some controversy between the Advisory Council and National Trust. We are not somehow litigation counsel to the Advisory Council and are not now and have never been.

That is why I say I am not particularly happy with this expression of a so-called agreement a comity agreement in the previous paragraph you read to me, because I am simply not aware that that is any sort of a formal construction.

So that this is Mr. Fowler's interpretation, and it is what it is.

Q: But it certainly is not your interpretation and you don't agree with it?

A: Well, my views on what the Justice Department policies are are largely irrelevant. But in terms of the role of the National Trust if this purports somehow to say that the National Trust acts as litigation counsel for the Advisory Council, that simply is not the case.

Q: Did you know that this affidavit was filed at the time of the National Trust's petition for intervention?

A: No, no.

Q: Did you know that it was filed in support of the National Trust's petition for intervention in Jobbers' Canyon?

A: I know that, in a very general way, yes.

Q: Was any action ever suggested by you that the affidavit should be withdrawn?

A: No, because as I think I indicated a few minutes ago I hadn't actually read this affidavit in terms – until within the last couple

of weeks. So that not knowing what it said I hardly would have moved to cause it to be withdrawn.

Q: Since standing is an issue and now that you know it, is it your position that it should be withdrawn?

A: Well, I think that – it would seem to me offhand that is Mr. Fowler's decision. I mean, this is his affidavit.

Q: But it certainly doesn't –

A: He is not speaking here on behalf of the National Trust. He is speaking as General Counsel of the Advisory Council, which is not us.

Q: But the General Counsel for the National Trust introduced that in evidence in support of its petition for intervention.

A: Decisions and exhibits that the General Counsel introduces I suspect is – happily, the reason that we have a General Counsel, Mr. North.

I don't know anything about the trying of our lawsuits in terms of affidavits and what would be introduced or not introduced.

Q: But you make the decision as to whether you should intervene.

A: I do, indeed.

(Exhibit 4011, 106:2-113:16).

I next turn to the impact upon the Advisory Council. Perhaps the main function of the Advisory Council is to conduct the so-called section 106 consultation. It should

be emphasized at this point that the section 106 consultation does not require private individuals, entities, or state or local governments to participate; rather, it is designed such that federal agencies are required to consult with the Advisory Council. When the Trust sues a federal agency or administrator to force consultation, two distinct and unfortunate results occur insofar as the Advisory Council and the consultative process are concerned.

First, the Trust has by virtue of such a suit arrogated unto itself the responsibility of policing the section 106 process as among the various federal agencies and instrumentalities. If federal agencies are to be called to account for alleged failure to consult under section 106 by other federal agencies or instrumentalities, the statutes and the legislative history assign this task to the Advisory Council, not the Trust. The legislative history of the statutes creating the Advisory Council and enacting the section 106 review process make it clear that Congress intended that if any federal instrumentality was to sue another to force consultation, it was the Advisory Council's responsibility to do so. This is a Congressional policy choice of singular importance.

Second, when the Trust decides to sue to force consultation, it immediately makes itself a litigant rather than an impartial member of the Advisory Council. Without doubt, the reason for placing the Trust, through its chairman, in membership on the Advisory Council was to provide the Advisory Council, and those federal agencies which consult with the Council, with the unique talents of the Trust. Inherent in the creation of the consultative process is an expectation that the process, and thus the members of the Council, will be *impartial*, for the Council

members are about the making of *public policy*. Indeed, Congress has explicitly recognized that "the Council's decisions on preservation questions that come before the Council represent a public interest determination, that assures that historic preservation needs are satisfactorily balanced with other public policy requirements." H.R. Rep. No. 96-1457, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 6378, 6405. Inherent in the making of salutory public policy is objectivity. It can scarcely be doubted that federal agencies which consult with the Advisory Council will have reason to question the very integrity of the consultative process if a congressionally chartered member of the Council, like the Trust, absent explicit authority from Congress, is at once litigating against the federal agencies to force consultation and at the same time purporting to act as an impartial conferee during the consultative process.

Finally, the carefully crafted legislative relationship between federal agencies, the Trust, the Advisory Council, the Secretary of the Interior, and the Attorney General regarding historic preservation matters is a relationship formulated to insure cooperation, not litigation, between the federal players. The Trust was created not to litigate against government entities, but rather as "[a] supplement [to] the Federal program of preservation." H.R. Rep. No. 855, 81st Cong., 1st Sess., *reprinted in* 1949 U.S. Code Cong. & Admin. News 2285, 2288 (Letter from J. A. Krug, Secretary of the Interior, to Hon. J. Hardin Peterson, Chairman, Committee on Public Lands, House of Representatives (June 14, 1949)). Throughout the legislative history of national preservation law subsequent to the

creation of the Trust, Congress "recogniz[ed] the necessity for a high degree of cooperation and coordination of Federal activities if the Nation is to enjoy both the fruits of progress and its heritage from the past." H.R. Rep. No. 1916, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Admin. News 3307, 3310. Congress continually sought to find means of "avoiding conflicts of administrative jurisdiction." *Id.* Thus, in addition to the specific adverse impacts upon the management of the Trust and the functioning of the Advisory Council, suits such as the one here, where in a sense the Trust threatens a federally funded park in order to save federally recognized historic warehouses, challenge an essential premise of federal preservation law as between federal entities – "a high degree of cooperation and coordination of Federal activities." *Id.*

(c)

The Trust argues that it has the capacity to sue because: the statutes do not explicitly prohibit such suits; the legislative history of the statutes creating the Trust contemplate public participation in historic preservation efforts; when the Congress enacted the Historic Preservation Act in 1966, and particularly the attorneys' fee section of the 1980 amendment, individuals and nonprofit corporations were authorized to bring enforcement suits, and at least one federal court has authorized attorneys' fees in favor of the Trust; and, despite the long litigation history of the Trust, the courts have not found capacity lacking, but the Illinois Supreme Court has held that the Trust has capacity to sue. I shall address each argument in turn.

The Trust argues that the statutes creating the Trust do not explicitly prohibit such enforcement suits. This statement is true as far as it goes. As I previously indicated, the statutes cannot, however, be read to authorize such suits against federal agencies.

The Trust is a nonprofit corporation, 16 U.S.C. § 468, with the power "[t]o sue and be sued," *id.* § 468c(b), "[t]o the extent necessary to enable it to carry out the *functions* vested in it by sections 468 to 468e [of title 16 of the United States Code]." *Id.* § 468c (emphasis added). The *functions* of the Trust are expressed in only one place, 16 U.S.C. § 468:

> The purposes of the National Trust shall be to receive donations of sites, buildings, and objects significant in American history and culture, to *preserve and administer them* for public benefit, to accept, hold, and administer gifts of money, securities, or other property of whatsoever character for the purpose of carrying out the *preservation program*, and to execute *such other functions* as are vested in it by sections 468 to 468e of this title.

Id. § 468 (emphasis added).

16 U.S.C. § 468a establishes a principal place of office for the Trust. 16 U.S.C. § 468b establishes the board of trustees for the Trust, which includes the Secretary of the Interior and the Attorney General as ex officio trustees. 16 U.S.C. § 468c describes the powers and duties of the Trust, without expanding the "functions." 16 U.S.C. § 468d authorizes the Trust to consult with the Advisory Board on National Parks, Historic Sites, Buildings, and Monuments (which is not the Advisory Council). 16

U.S.C. § 468e has been repealed. The only description of "functions," therefore, occurs in 16 U.S.C. § 468.

The "preservation program" referred to at the end of section 468 appears to refer to the word "preserve," appearing earlier in the statute. This is because the word "them" is a pronoun referring to the nearest antecedent nouns with which it agrees in gender and number, to wit: "sites, buildings and objects significant in American history and culture." *Id.* § 468. It would appear generally therefore that the *functions* of the Trust are, at least primarily, intended to serve the goal of preservation of historic sites by acquisition, lease, contract, load or the like. Indeed the only place in the delineation of the Trust's powers where federal agencies are mentioned, is the power of the Trust, not to sue such agencies, but rather "[t]o contract and make cooperative agreements" with such agencies. *Id.* § 468c(g).

The statute is simply incapable of being plainly read to suggest that the Trust may sue federal agencies for the purposes of enforcing a regulation promulgated by the Advisory Council and forcing section 106 review, particularly when the Trust has not acquired, and will not in the future acquire, directly or indirectly by gift, purchase, contract, loan, or otherwise an interest in the property to which the regulation is said to apply.

The Trust next argues that the legislative history of the statutes creating the Trust indicates that the Trust, in 1949, was expected to "mobilize and coordinate public interest and participation in the preservation and interpretation of sites and buildings from voluntary resources.

It will fill the gap in the present system of Federal legislation in this field . . . ." Intervenor's Memorandum and Rule 20(D) Factual Statement in support of Motion for Partial Summary Judgment at 5 (emphasis deleted) (quoting H.R. Rep. No. 855, 81st Cong., 1st Sess., *reprinted in* U.S. Code Cong. & Admin. News 2285, 2288 (Letter from J. A. Krug, Secretary of the Interior, to Hon. J. Hardin Peterson, Chairman, Committee on Public Lands, House of Representatives (June 14, 1949))). From this history, the Trust argues that it was authorized to become an "activist," and presumably to sue federal entities. It must be emphasized that the quotation from the legislative history upon which the Trust relies is taken from a letter written by the Secretary of the Interior supporting legislation creating the Trust. *Id.* It can scarcely be believed that the Secretary of the Interior was supporting legislation authorizing the Trust to sue the Secretary when the Secretary made no mention of such a possibility. Obviously, Congress could not have contemplated that it was authorizing the Trust to sue the Secretary of the Interior, and other federal agencies, so as to enforce a regulation of the Advisory Council and to force a section 106 consultation, when the Advisory Council and the section 106 process were not written into law until long after the statutes creating the Trust were enacted. Moreover, the legislative history, as recounted earlier, simply cannot be read to support the Trust's conclusion that Congress intended to generally authorize the Trust to sue federal agencies when it created the Trust; in fact, the contrary conclusion is evident from the legislative history.

Further, the Trust argues that Congress intended for the Trust to be able to sue in cases such as this because

Congress authorized enforcement suits when it adopted the National Historic Preservation Act in 1966, and particularly because Congress authorized awards of attorneys' fees to private individuals and nonprofit corporations in 1980. 16 U.S.C. § 470w-4. *See* H.R. Rep. No. 96-1457, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 6378, 6409; *National Trust for Historic Preservation v. U.S. Army Corps of Eng'rs*, 570 F. Supp. 465, 468 (S.D. Ohio 1983). Neither 16 U.S.C. § 470w-4 nor the legislative history mentions the Trust. The issue in this case is not whether private enforcement suits are authorized, but whether Congress intended the corporation which it created to sue federal entities. The congressional explanation of the attorneys' fee provision does not discuss the Trust suing federal entities and is essentially limited to the uninformative statement that "[t]he intent is to ensure that property owners, non-profit organizations and interested individuals who may otherwise lack the means for court action be awarded reasonable costs for actions taken under this Act." H.R. Rep. No. 96-1457, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 6378, 6409. It was in 1980, in the same legislation, that Congress explicitly discussed the Advisory Council suing federal entities, but Congress made no effort to amend or discuss the statutes governing the capacity of the Trust to sue federal entities. *Id.* at 6405. In the one case that the Trust was awarded attorneys' fees against a federal entity, the issue of whether the Trust had the capacity to sue federal entities was not raised, but rather the parties stipulated that if the Trust was entitled to fees the award should be paid by the federal defendants. *National Trust for Historic Preservation,*

570 F. Supp. at 467 (stating that "the parties stipulated that any award of attorney fees would be entered solely against federal defendants").

Finally, the Trust argues that it has instituted ten cases in the last nine years in an effort to enforce historic preservation policy, but the courts have not found a want of capacity. Further, the Trust argues that the Illinois Supreme Court has held that the Trust has capacity to sue to enforce historic preservation laws. These arguments are easily disposed of.

The issue of capacity has for the first time been raised by the Justice Department in this suit. Thus, the litigation history of the Trust is hardly persuasive since no federal court has been confronted with the issue. Moreover, the Illinois Supreme Court dealt with the capacity issue of the Trust in relationship to the Trust's standing to sue *only* nonfederal defendants regarding Illinois preservation law. *Landmarks Preservation Council v. City of Chicago*, 1988 Ill. LEXIS 122 (Ill. Sup. Ct., Sept. 22, 1988). The Illinois Supreme court thus had no occasion to consider the impact of the Trust's suit against federal entities and the related effect on the workings of the federal historic preservation program.

(2)

The nonfederal defendants also argue that the Trust lacks the capacity to sue them. While I agree that the wording of the Trust's functions in 16 U.S.C. § 468 does not seem to contemplate that the Trust has "functions" independent of situations where it has, or may acquire,

some type of economic interest in a specific historic property, I cannot conclude that the Trust lacks the capacity to sue the nonfederal defendants. I come to this conclusion essentially because there is no grave interference with the performance of a governmental function when the Trust sues nonfederal defendants. And, applying the liberal construction rules, *Loeffler*, 56 U.S.L.W. at 4555-56; *Burr*, 309 U.S. at 245, to the "sue and be sued" clause, 16 U.S.C. § 468c(b), I must find in favor of the Trust and against the nonfederal defendants on this issue.

Parenthetically, to the extent the defendants argue that the various corporate plaintiffs or intervenor failed to properly authorize the suit as a matter of simple corporate law, as for example where it is argued the board of directors did not explicitly authorize the suit, but delegated general litigation decisions to the president of the corporation, I have carefully reviewed the evidence on these questions. My understanding was, and is, that the capacity issue essentially related to whether Congress had authorized the Trust to sue, not whether as a matter of corporate law some act or omission had been taken or omitted by the corporate plaintiffs or the intervenor. (Filing 98, Memorandum and Order, May 20, 1988 (holding that the Trust should be authorized to intervene, stating the magistrate had "very serious concerns that the Trust may lack the capacity to sue by virtue of limitations inherent in the Act of Congress which created the Trust," but leaving the issue for resolution at a "later date")). In any event, I have carefully reviewed the evidence and arguments of the parties and conclude that the record adequately supports the conclusion that all corporate parties had the authority to institute this suit as a matter of

basic corporate law as distinguished from the Trust's lack of statutory capacity to sue federal defendants in a case such as this.

III.

The remaining issues for disposition – parties and conversion – are intertwined and thus will be disposed of together. Essentially the following intricate arguments are advanced by the plaintiffs and the intervenor:

1. Under the LWCFA grant documents with the State of Nebraska and the National Park Service, Douglas County was obligated to acquire fee title to Central Park East so that the property could be maintained as a public park in perpetuity as required by the grant documents and 16 U.S.C. § 4601-8(f)(3);

a. Douglas County acquired defective title to a portion of the Central Park East from the Burlington Northern Railroad because the Railroad could not convey fee simple title inasmuch as it obtained its title by condemnation in the late 19th century and, pursuant to Nebraska real property law, the Railroad acquired only a right to use the property which did not entitle the Railroad to convey fee simple title to Douglas County;

b. A title defect is the same as a conversion of Central Park East to a nonpublic outdoor recreation use;

c. The grant agreements and the LWCFA require the Park Service to take action to remedy the violation;

d. Once the National Park Service acts, or has a duty to act, to cure the violation, the provisions of the

NHPA and the NEPA are implicated, requiring an environmental impact statement or a section 106 consultation, or both, and the court should enjoin the parties from proceeding with the redevelopment agreement until the federal environmental and historic preservation statutory requirements are satisfied; and

2. Under the LWCFA grant documents with the State of Nebraska and the National Park Service, Douglas County was obligated to acquire fee title to Central Park East so that the property could be maintained as a public park in perpetuity as required by the grant documents and 16 U.S.C. § 4601-8(f)(3).

a. If Douglas County acquired good title to Central Park East, the deed to the County from the Railroad recited that the County was conveyed certain vacated portions of streets, the vacated portions of the street became part of the LWCFA section 6(f)(3) boundaries, and the City is condemning part of the vacated street as a part of the Redevelopment Agreement for purposes other than for use in Central Park East;

b. The condemnation is the same as a conversion of Central Park East to a nonpublic outdoor recreation use;

c. The grant agreements and the LWCFA require the National Park Service to take action to remedy the violation;

d. Once the National Park Service acts, or has a duty to act, to cure the violation, the provisions of the NHPA and the NEPA are implicated, requiring an environmental impact statement or a section 106 consultation,

or both, and the court should enjoin the parties from proceeding with the redevelopment agreement until the federal environmental and historic preservation statutory requirements are satisfied.

The defendants, of course, deny these arguments, and further contend that the plaintiffs and the intervenor have not joined as parties those persons who claim an interest in the real property for which the plaintiffs and the intervenor claim there is defective title, thereby requiring dismissal under Federal Rule of Civil Procedure 19. I turn now to a discussion of those arguments.

A.

I now examine the first argument of the plaintiffs and the intervenor. In an effort to acquire the property which would be used to establish Central Park East, the County took a special warranty deed from the Burlington Northern Railroad. (Exhibit 3000). There is no dispute that the county was required to obtain fee title to the real estate pursuant to the grant agreements existing between the County and the state, on the one hand, and the state and the Park Service on the other hand, except for an easement, limited to five years, which the County conveyed back to the Railroad with the approval of the Park Service and customary utility easements. (Vol. VIII, TR 1760:22-1762:17 (Testimony of Kenneth Compton)). There is further no dispute that any "conversion" of the property to a use other than for a public park would require the approval of the Park Service, and no such approval has been given. (Vol. VIII, TR 1765:18-1766:3 (Testimony of Kenneth Compton)).

The plaintiffs and the intervenor contend that the Burlington Northern Railroad did not own a "conveyable" interest in most, but not all, of the property at the time it delivered the special warranty deed to the County and "[t]hus the county has failed to comply with its obligations under the Land and Water Conservation Fund Act." Plaintiffs' and Intervenor's Post-Trial Brief on Title Issues and Necessary Parties at 2 [Hereinafter Plaintiffs' Post-Trial Brief]. I cannot agree with the arguments of the plaintiffs and the intervenor for the following reasons.

(1)

First, the plaintiffs and the intervenor assume in their argument that a title defect is the equivalent of a "conversion" by analogizing to an opinion of the Second Circuit Court of Appeals which, according to the plaintiffs and the intervenor, stands for the proposition that "a conversion includes instances in which '[p]roperty interests are *conveyed* for non-public outdoor recreation uses.' *Friends of Shawangunks, Inc. v. Clark*, 754 F.2d 446, 451 (2d Cir. 1985) (quoting Dep't of Interior Memorandum, May 15, 1978) (emphasis in original)." Plaintiffs' Post-Trial Brief at 24. I do not agree with this assumption, nor do I agree with the analogy.

Simply because strangers to the County's title may prove a title defect (which can be assumed for the sake of argument only), it does not follow that a "conversion" has occurred or is reasonably threatened. Title defects in the abstract (no pun intended) fail to threaten the County, the Park Service or Central Park East in terms of the

property continuing to be devoted to outdoor public recreation as a park. Mr. Compton of the Park Service, in my view, properly defined when a conversion occurs, and that is when "the property or portions thereof is no longer used for public outdoor recreation purposes." (Vol. VIII, TR 1808:21-1809:1). Mr. Compton virtually recited verbatim the pertinent regulation cited by the plaintiffs and the intervenor, Plaintiff's Post-Trial Brief at 23-24, which states in pertinent part that the LWCFA property is to be "continually maintained in public outdoor recreation use." 36 C.F.R. § 59.3(a) (1988) (cited in Plaintiffs' Post-Trial Brief at 23-24 as 36 C.F.R. § 59.1(a)).

Put simply, there has been no "conversion" or threat of conversion established on this record, because the plaintiffs and the intervenor have failed to adduce *any* evidence that the "title defect" threatens to change the use of the park as a park. No evidence is presented on the record that there are real claimants asserting the alleged title defect in a manner which threatens to divest the County of title to the park or otherwise convert the use of the park from outdoor public recreation uses. The most that the plaintiffs and the intervenor have been able to do was to show, *after* the trial in this case had ended and the parties had rested, that a lawyer wrote a letter to the City, not the County, making some claim to some of the real property after apparently making some unspecified, but apparently gratuitous, offer of settlement to the County (filings 443 through 447). (The record was not reopened to receive additional evidence.) But, in any event, the City is not the County, and the County is the party responsible for maintaining the property as a public park. There has never been any showing before, during or after

trial that the County has been confronted with litigation over the claimed title defect to the property or that a claim has been submitted to the County, in the form required by state law, by real claimants putting the County on notice of a sincere claim. At this point the title defect, if there is one, is nothing more than a theoretical argument of lawyers for the plaintiffs and intervenor, which argument is asserted for purposes fundamentally irrelevant to the merits of the claimed defect, to wit, to force the Park Service to consult with the Advisory Council.

The reliance of the plaintiffs and the intervenor on *Friends of Shawangunks, Inc. v. Clark*, 754 F.2d 446, 451 (2d Cir. 1985), is accordingly misplaced. In that case the Second Circuit held, among other things, that a "conversion" occurred because the easement for outdoor recreation was amended, so the court said, to allow a change "from public enjoyment of an unspoiled area to private golfing." *Id.* at 451. The threatened "conversion" discussed by the Second Circuit took the form of a specific document which amended the manner in which LWCFA property would be operated. *Id.* Here, however, there is nothing more in the record than the theoretical concern of the lawyers for the plaintiffs and the intervenor. Therefore, even if there were a title defect, on the record before me I find that the defect is not a conversion or a threat of conversion, because there is no evidence that the real property will in fact be used for something other than outdoor public recreation as a part.

In this regard, I note that the defendants presented substantial evidence to establish that it was unlikely that

the Park would be converted. This evidence takes two forms.

The County presented evidence that it received a special warranty deed to the Park from the Burlington Northern Railroad (Exhibit 3000). A special warranty deed is generally recognized to *warrant title* by the grantor to the property conveyed "against all claims which [the grantor] may have created at any prior time." 7 G. Thompson, *commentaries on the Modern Law of Real Property* § 3191, at 339 (1962 Replacement) (footnote omitted). What a special warranty deed does not do is warrant title as against the acts of persons who were predecessors in title to the railroad. *Id.* Here, the plaintiffs and the intervenor claim that title failed when the Burlington Northern Railroad "abandoned" its interest in the real property by attempted alienation: "When Burlington attempted to alienate its interest in 1984, for park purposes rather than railroad purposes, the abandonment occurred, and the property reverted to the servient estate holders." Plaintiffs' Post-Trial Brief at 6-7. In essence, the plaintiffs and the intervenor argue that the Burlington Northern Railroad could not "dispose of, alienate or even lease its easement for any purpose except for the operation of a railroad." *Id.* at 5 (emphasis deleted) (quoting *Roberts v. Sioux City & Pac. R.R.*, 73 Neb. 8, 22, 102 N.W. 60, 65 (1905)). Therefore plaintiffs and intervenor appear to argue that the Burlington Northern breached its warranty the moment it executed the deed.

For reasons more specifically discussed later, I question the applicability of *Roberts* to the facts here. But, at this point in the discussion, I believe that the special warranty deed is strong evidence that the Burlington

Northern Railroad believed that it had "some" title to convey to the park property it obtained solely by condemnation, at least to the extent that the Burlington Northern Railroad believed that delivery of the deed was not also a breach of its special warranty. For if the rational of the plaintiffs and the intervenor is accepted as being the law, the Burlington Northern Railroad, receiving over five hundred thousand dollars for the conveyance, would have known that it was in effect buying a lawsuit by giving a special warranty deed.

This is so because the special warranty deed warranted against acts of the Burlington Northern Railroad, and if the law were as the plaintiffs and the intervenor suggest, then the Burlington Northern would have conveyed by quitclaim deed, making no warranties whatever, and thereby avoiding any claim that the Burlington Northern Railroad breached its warranty in the special warranty deed that it had done nothing to impair the title. Note that the special warranty deed warrants that the railroad "is lawfully seized of such real estate," had "the legal power and lawful authority to convey the same," and "warrants and will defend title to the real estate against the lawful claims of all persons claiming the same or any part thereof through, by or under" the Railroad. (Exhibit 3000). The County and the Park Service thus have good reason to believe that the Burlington Northern Railroad will vigorously defend the title to the real estate against claims like those made by the plaintiffs and the intervenor, if real claims were ever made to take the park property from the County.

Next, the defendants presented evidence that the County received a title insurance policy in the sum of five

hundred and forty-three thousand dollars, insuring the County's fee simple interest in the park property. (Exhibits 3076, 3077, pages 2-4; Exhibit 4006; Vol VII, TR 1546:5-1588-8). Once again, like the Burlington Northern Railroad's special warranty deed, the title insurance policy is convincing evidence that if anyone attempted to take the park property from the County, the County would be vigorously defended by the title insurance company.

With regard to the title insurance policy, I pause to note a particular problem that occurred at trial. Pursuant to our Local Rules of Practice and the progression order in this case, the parties prepared a joint pretrial order and exhibit list. On the exhibit list prepared by the plaintiffs and the intervenor, those parties endorsed as *their* exhibits documents described by them as follows: Exhibit 3076, "Safeco title ins. policy 7/2/84" and exhibit 3077, "Title ins. policy w/FAX cover letter 6/13/88." The defendants did not object to these documents, and accordingly these exhibits were to be received into evidence without further offer, pursuant to the pretrial order. (Filing 429, paragraph I and page 6 of attached exhibit list).

At trial, the plaintiffs and the intervenor *objected* to the offer of their own exhibits, essentially because the exhibits did not contain the "boilerplate" for the title insurance policy. I denied these objections. Exhibit 3076 is a title insurance commitment, not, as listed, as title insurance policy. Exhibit 3077 is a "fax cover letter" with notes of a lawyer representing ConAgra together with the "guts," or principal endorsement pages, of the title insurance policy, but not the "boilerplate." (Exhibit 4006 is a duplicate of the principal endorsement pages obtained

from the files of the title insurance agent.) When the defendants recognized that the "boilerplate" to the title insurance policy was not attached to the exhibits they began, during trial, to locate a duplicate original of the entire policy. They were apparently successful. (Exhibit 4008). Then the defendants offered the duplicate original of the policy, and the plaintiffs and the intervenor objected. I sustained the objection because the "boilerplate" had not been endorsed on the pretrial order.

I received Exhibits 3076 and 3077 because there were no objections made to these exhibits at the time of the pretrial conference – which took place in the morning, with the trial commencing in the afternoon of the same day. Simply, the plaintiffs and the intervenor had their exhibits, knew what they contained, and listed them as exhibits which *they* intended to offer. Under the circumstances, the fact that the "boilerplate" was not included was evident to the plaintiffs and the intervenor. This was not a cause where the plaintiffs and the intervenor misunderstood the significance of their own documents, as this title issue and these exhibits were well known to the plaintiffs and the intervenor substantially in advance of trial.

Moreover, there is no doubt that a title insurance policy was issued, for there was a title insurance commitment. (Exhibit 3076). The pertinent schedules to the policy were before the court. (Exhibit 3077). Still further, the agent who wrote the policy testified that he issued the policy, and he compared Exhibit 3077 (the alleged pertinent schedules) with exhibit 4006 (a copy he kept of the pertinent schedules), and he was able to say that Exhibit 3077 was in fact a true copy of the pertinent schedules to

the policies. (Vol VII, TR 1546:5-1588:8). The agent was subject to extensive cross-examination. Therefore, I am not hesitant to conclude that, insofar as any threat of conversion is concerned, the title insurance policy provides convincing evidence that the County would be vigorously defended if a title claim were made.

On the other hand, the insurance "policy" was not used by me to credit the County with the statutory presumption that the County had offered prima facie evidence of title. Under the Nebraska statutes, once the *entire* policy was offered by the defendants, they would have established a prima facie case that title was in the County. Neb. Rev. Stat. § 25-1292 (Reissue 1985). The defendants failed to produce the "boilerplate" until during the trial, and there simply was no excuse for this failure. The defendants knew full well the need to have the entire policy if they were to take advantage of the statutory presumption, but they waited until after the trial started to provide opposing counsel with the entire policy. Out of simple fairness I thought it wrong to allow the defendants the statutory presumption when they had, without good excuse, failed to disclose, or even identify, the complete policy in the pretrial exhibit lists. I refused the offer solely for the reason that the "boilerplate" was not disclosed in the pretrial order.

(2)

Second, I find that the plaintiffs and the intervenor failed to prove a title defect because they failed to present evidence at trial establishing each link in the chain of title. I could not, therefore, conclude as a matter of fact

that the Burlington Northern Railroad did not have title at the time it conveyed, by special warranty deed, the park property to the County. Fundamentally there are four ways to prove title.

The first way to prove title is to put into evidence an abstract of title prepared by an abstracter duly licensed in Nebraska, in which event the abstract must show "each link in the chain of title," Neb. Rev. Stat. § 76-556 (Reissue 1986), and when each link is abstracted the abstract constitutes prima facie evidence of the documents so shown affecting title to real estate. *Id.* § 25-1292 (Reissue 1985). (An abstract of title is "a compilation in orderly arrangement of the materials and facts of record affecting the title to a specific piece of land, issued under a certificate certifying to the matters contained in such compilation." *Id.* § 76-537(1) (Reissue 1986).) The second way to prove title is to have prepared a policy of title insurance issued by a title insurance company licensed to do business in Nebraska, and when the title insurance policy is received it constitutes prima facie evidence of the ownership, liens, mortgages and interests which are indicated in the policy. *Id.* § 25-1292. Third, one may hire an expert witness to conduct a title search and then have the expert express an opinion on the state of the title pursuant to Federal Rules of Evidence 702 and 704. Fourth, one may prove title by copying all of the pertinent records which establish the chain of title and offer them in evidence, thereby, in effect, "abstracting" the record like an abstracter would do when preparing an abstract. Then the court is asked to apply the law to the facts representing the state of the title. The plaintiffs and the intervenor did not have an abstract of title prepared and did not have a

title insurance policy issued. Rather, the plaintiffs and the intervenor tried to establish the lack of title by having certain persons prepare limited title searches and alternatively by copying all pertinent records on file with the Douglas County Register of Deeds as shown by a tract index.

As to the limited title searches, these documents were not received for a number of reasons (*see, e.g.*, Exhibits 3072 and 3073; Vol VII, TR 1508:24-1511:25; Exhibits 3031, 3033, 3035, 3037, 3043, 3045, 3047, 3049, 3051, 3053, 3057, 3061, 3067, 3069, 3071, 3039, 3041, 3055, 3059, 3063 and 3065; Vol VII, TR 1661:18-1673:7). The title researches were prepared by Sherri Schrat and John R. Daum, representatives of two different title companies. The title searches are not abstracts, but are rather reports of title that express opinions of the title examiner. The title reports did not include judgment searches of the records of the clerk of the district court for Douglas County, Nebraska. Ms. Schrat is not a licensed abstracter, and someone else from the company where she worked signed the certificates which she prepared. Mr. Daum is a lawyer and an [sic] a licensed abstracter. He prepared some of the titles searches himself, and he directed someone under his supervision to do so with regard to other searches. These limited title searches were not received into evidence for a number of reasons, and, I shall discuss only two of the reasons here for purposes of brevity, the other reasons being stated on the record.

The title searches are written reports of the title examiner and purport to express an opinion as to title. Despite the clear requirements of the progression order in this case (filing 275) requiring each party to give the

information provided for in Federal Rule of Civil Procedure 26(b)(4)(A)(i), the plaintiffs and the intervenor did not designate anyone as an expert to testify as to title until long after the time to do so had run, and then they did so just before trial. About two days prior to trial, the plaintiffs and the intervenor attempted to obtain permission to designate, out of time, experts on the issue of title. Permission to do so was denied because the plaintiffs and the intervenor did not desire a continuance of trial so as to allow the defendants to be prepared to meet the late designation by discovery and counter endorsement of experts. (Filing 422). Therefore, at trial I refused to receive the title reports because the reports contained the expert opinions of the title examiners, the plaintiffs and the intervenor had failed to designate the experts within the time provided by the progression order, and I believed that the defendants would have been prejudiced. *See Easley v. Anheuser-Busch, Inc.*, 758 F.2d 251, 258 (8th Cir. 1985) (stating, in a bench trial, that the exclusion of experts as a result of the failure to make appropriate discovery was not an abuse of discretion).

Next, I found that the title reports, as expressions of opinion, would not be helpful to the court, since the title searches were not predicated upon a full record search. There is no dispute that the title searches are limited, meaning that the examiner did not search the records of the Clerk of the District Court of Douglas County, Nebraska or the probate records of the Clerk of the County Court of Douglas County, Nebraska. Mr. Daum, the examiner hired by the plaintiffs and the intervenor, although giving somewhat different testimony during a deposition, explained that to determine title it would

have been "helpful" to have searched the records of the clerk of the district court for judgments and that he would not have issued a title insurance policy without doing a search of the district court records:

Q (by the court): Did you conduct a judgment search?

A: No, Your Honor.

. . . .

Q: If you were in the – are you in the business of issuing title insurance?

A: Yes.

. . . .

Q: Would you have issued a title insurance binder without conducting a search of the judgment records?

A: No.

. . . .

Q (by counsel for the plaintiffs and the intervenor): If you were trying to determine whether Douglas County obtained fee title through Exhibit 3000 [the special warranty deed from the Railroad to the County], would a judgment search have been necessary in your view?

. . . .

A: I believe a judgment search would have been helpful.

Q: Do you think it would have been necessary?

A: Possibly not.

. . . .

Q: Mr. Daum, can you think of anything that your firm could have done, any record that it could have searched which would change your opinion as to whether the County took fee title through the special warranty deed?

. . . .

A: Despite of [sic] what I may have testified during my deposition, I have to answer, yes, there may have been another place where we could have searched.

Q: Where would that be?

A: It would have been in the District Court.

Vol VII, TR 1663:22-1671:2).

The following is generally recognized in relation to Federal Rule of Evidence 705:

> If the Trial Judge believes that there is some chance that an opinion is based upon impermissible data, the Judge may order the witness to reveal the data before offering an opinion. The last clause of the first sentence [of Rule 705] authorizes this procedure, and it is likely that the Court will use its authority when a suggestion is made that the expert has considered unreliable information in reaching an opinion.

S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 701 (4th ed. 1986) (discussing Rule 705). In this case, even

if Ms. Schrat and Mr. Daum had been properly designated as experts, their opinions, expressed in the limited title searches, would have been virtually no value to the court.

In this case, the plaintiffs and the intervenor wanted Ms. Schrat and Mr. Daum to give expert testimony that the Burlington Northern Railroad did not have fee simple title to the real estate conveyed to the County at the time of the conveyance. Essentially, the plaintiffs and the intervenor believed that the Railroad, through its predecessor by merger, had acquired the property by condemnation in 1882, and the Nebraska Supreme Court had held that a railroad in Nebraska does not obtain fee title when acquiring property by condemnation. *See Lillich v. Lowery*, 211 Neb. 757, 759-60, 320 N.W.2d 463, 464 (1982); *Roberts v. Sioux City & Pac. R.R.*, 73 Neb. 8, 22, 102 N.W. 60, 65 (1905). Accordingly, the plaintiffs and the intervenor claimed that the fee simple title "reverted" to the heirs of the original condemnees when the Railroad "abandoned" the property by conveying it to the County. *See Roberts*, 73 Neb. at 22, 102 N.W. at 65. Therefore, a central question became whether anyone in the chain of title who were predecessors in interest to the County – the Railroad, the original condemnees or the heirs of the original condemnees – had done something to affect the title *after* the condemnation, upon which the Railroad relied in part for its claim of title, which either did or did not confirm title in the Railroad. It was critical that the records of the district court, not just those of the register of deeds, be searched and presented to the court. Otherwise, any title opinion would be grossly speculative.

In Nebraska, instruments between parties are valid even if not recorded with the register of deeds. Neb. Rev. Stat. § 76-238 (Reissue 1986) (stating: "*Provided*, that such [unrecorded] deeds, mortgages and other instruments shall be valid between the parties."). Before a judgment is entered, but after suit is filed, a lawsuit is itself, assuming service of process, notice to the litigants, and no lis pendens filed with the register of deeds is necessary to bind the parties to the suit. *First Nat'l Bank v. Young*, 124 Neb. 598, 601, 603-04, 247 N.W. 586, 587, 588 (1933); Neb. Rev. Stat. § 25-531 (Reissue 1985). Indeed, the Nebraska lis pendens statute is discretionary by its terms. Neb. Rev. Stat. § 25-531 (Reissue 1985). And "[w]hen the summons has been served or publication made, the action is pending so as to charge third persons with notice of pendency, and while pending no interest can be acquired by third persons in the subject matter thereof, as against the plaintiff's title." *Id.* After a judgment has been rendered in the district court of the county where the real estate is situated, "[t]he lands and tenements of the debtor within the county where the judgment is entered shall be bound for the satisfaction thereof from day which such judgment is rendered." *Id.* § 25-1305 (Reissue 1985). *See id.* § 25-1504. Still further:

> When any judgment or decree shall be rendered for a conveyance . . . and the party or parties against whom the judgment or decree shall be rendered do not comply therewith within the time mentioned in said judgment or decree, such judgment or decree shall have the same operation and effect, and be as available as if the conveyance . . . had been executed conformable to such judgment or decree.

Id. § 25-1304.

Thus, an important question was whether the Railroad and the original condemnees and the heirs of the original condemnees had been parties to any litigation in the district court of the county where the land was situated regarding the title to the real estate, for if they had been, persons subject to a judgment of the state court would be bound to the judgment by Neb. Rev. Stat. §§ 76-238 (Reissue 1986), 25-1304, 25-1305 & 25-1504 (Reissue 1985), regardless of whether anything had been filed with the register of deeds. This is why Mr. Daum testified that he conducts a judgment search of the records of the clerk of the district court in the county where the real estate is situated – in this case Douglas County, Nebraska, – before he insures title, since by law parties in the chain of title – here either the railroad, original condemnees or the heirs of the original condemnees – are bound by decrees and judgments entered by the state district court, whether or not something is filed with the register of deeds. *Id.* §§ 25-1304, 25-1305, 25-1504 & 76-238. *See, e.g.*, Nebraska Title Standard No. 6 (providing that "[a]fter the service of process, the pending action is itself notice to all the world that persons dealing with the title will be bound by the result of the litigation. Thus, in every such case the examiner must look to the ultimate result of litigation as shown by the court records and not to the statutory notice [lis pendens] in order to pass upon the merchantability of the title"); Neb. Rev. Stat. § 76-556 (Reissue 1986) (providing that "[a] registered abstracter shall show each link in the chain of title, and failure to do so shall render him or her liable to any person injured by such omission. . . . When a registered abstracter relies upon the numerical index alone to refer him or her to all

entries upon the records affecting the title to property, such reliance shall be at his or her peril.").

For example, it would have been important to know whether the Railroad or its predecessor had commenced a quiet title action against the condemnees or the heirs of the original condemnees or vice versa. Neb. Rev. Stat. §§ 25-21,112 to -21,120 (Reissue 1985). Nowhere in the quiet title statutes is there any requirement that anything be recorded with the register of deeds. While there may have been a time in Nebraska when the statutes required that a quiet title decree be filed with the register of deeds to be binding against subsequent purchasers without notice, it has never been the law that parties to litigation are exempt from the provision of the quiet title decree if the decree was not recorded in the register of deeds office. *McCarthy v. Benedict*, 90 Neb. 386, 389, 133 N.W. 410, 411 (1911) (stating that under former law, a decree quieting title not recorded in the register of deeds office is not binding upon a person "who was not a party to the action to quiet title"). (There is no issue in this case as to whether a subsequent purchaser without notice would be bound by the decree; rather, the question here is whether such a decree was entered in favor of or against the Railroad or original condemnees and the heirs of the original condemnees). Under present law, it is clear that when all defendants having a record interest in the real estate are served with summonses and all defendants not having a record interest are served by publishing notice against the land, naming interested persons "real names unknown," the judgment and decree is "conclusive" as against them. Neb. Rev. Stat. § 25,21,113 [sic] (Reissue 1985).

At this point, it is helpful to realize that the legal principle relied upon by the plaintiffs and the intervenor is not clear; that it, I do not regard as clear the principle that under Nebraska law railroads were prohibited from acquiring fee simple title by condemnation in 1882, if that is what the railroad intended to acquire. It is plausible from the record that what the Burlington Northern Railroad's predecessor intended to, and did, acquire was in fact fee simple title. Thus, I do not regard the search of the records of the Clerk of the District Court to be an exercise in futility, but rather such an effort is an appropriate condition precedent to this court being asked to express an opinion on title. I shall explain.

The argument advanced by the plaintiffs and the intervenor is that the Burlington Northern Railroad did not have fee simple title to convey to the County because its predecessor by merger could not acquire fee simple title by condemnation. Neither the substantive grant of statutory power to condemn which was enjoyed by railroads in 1882 nor the 1882 award of condemnation make clear that the Railroad could not or did not acquire fee simple title. Although Nebraska cases decided after the award of condemnation in 1882 hold that when a railroad acquires a "rightway" it in fact acquires an "easement" allowing the fee to revert to the holder of the servient estate upon abandonment of the easement, no Nebraska case has been called to my attention that holds that a railroad intending to acquire fee simple title by condemnation was prohibited from doing so in 1882.

Exhibit 3116 is a copy of pertinent portions of the law governing railroads in 1882. At chapter 98, section 81 of

the Nebraska Revised Statutes, the statute seems to allow condemnation of the fee simple title to real estate:

> Such corporation . . . may take, hold, and appropriate so much real estate as may be necessary for the location construction and convenient use of its road, including all necessary grounds for stations, buildings, workshops, depots, machine-shops, switches, side-tracks, turn-tables and water-stations; all materials for the construction and repair of said road and its appurtenances; and a right of way over adjacent lands, sufficient to enable such company to construct and repair its road, and a right to conduct water by aqueducts, and the right of making proper drains; *Provided,* That the lands held, taken and appropriated, otherwise than by the consent of the owner, shall not exceed two hundred feet in width, except for wood and water stations, and depot grounds, unless where greater width is necessary for excavations, embankments, or depositing waste earth; *Provided further,* That no appropriation of private property, for the use of any corporation provided for in this subdivision, shall be made, until full compensation therefor be first made or secured to owners thereof.

Id. § 98-81 (1881), *quoted in* Exhibit 3116.

There is nothing about this statute which suggests that a railroad was prohibited from acquiring fee simple title by condemnation. Indeed, in Nebraska the general rule seems to be that when a statute does not explicitly prohibit a taking of fee simple title, then the question is one for the condemnation court to determine as to whether a fee simple condemnation is necessary to satisfy the public purpose for which condemnation authority is

granted. *Burnett v. Central Nat'l Pub. Power & Irrig. Dist.*, 147 Neb. 458, 470, 23 N.W.2d 661, 668 (1946).

Moreover, before the court is the Report of Commissioners in the condemnation proceedings held in 1882 (Exhibit 3001) which is at best ambiguous, if one credits the arguments of plaintiffs and intervenor, as to whether the predecessor of the Burlington Northern Railroad intended, or was granted, fee simple title. Exhibit 3001 provides in pertinent part that the Commissioners in order to:

> ascertain and report the amount of damages that the owners and lienholders of the property hereinafter described will sustain by reason of the *appropriation of the said property* by the [Railroad] *for* the *right of way for rail road tracks,* sidetracks, depot buildings *and general railroad purposes* . . . we did . . . inspect each and every lot and parcel of land with the improvements thereon . . . And we do assess and hereby return as the damages for the appropriation of the following several parcels of land and lots [there following being a description of various lot and parts of lots in blocks 125, 126, 131, 155, 156, 161, 132, 154, and 162, City of Omaha, Nebraska, together with an indication of whether improvements were situated thereon, and an appraised value per lot] Total Forty Eight thousand one hundred and twenty five Dollars. . . . [T]he improvements being appraised and set forth in connection with the lots, where there are any improvements thereon the amount of such improvements being set forth separately from the reality.

(Exhibit 3001 (emphasis added)). Exhibit 3001 then indicates that the County Judge certified the report as: "In the

matter of the petition of the [Railroad] for the appointment of a Commission to award damages due *for the appropriation of certain lands and lots . . . and of the whole thereof.*" (Exhibit 3001 (emphasis added)).

At the *very least* the report of commissioners and the certification of the county judge suggests that the "appropriation" was *of* "certain land and lots . . . and the whole thereof" to be used not only *for* a "right of way for railroad tracks," but also, among other things, for "general railroad purposes." At the *very most*, the plaintiffs and the intervenor have pointed out an ambiguity in the Report of Commissioners. On the one hand, the Report of Commissioners could be interpreted to mean that the "appropriation" was "for" a "right of way," or, on the other hand, the Report of Commissioners could as easily be interpreted to mean that the "appropriation" was "of" the described "land and lots . . . and the whole thereof" for use, as a "right of way for railroad tracks" and for "general railroad purposes." In other words, was the "appropriation" a "right of way," or was the "appropriation" the real property, and "the whole thereof"?

Accordingly, any competent title examiner would want to know whether the district court in Douglas County, Nebraska had been confronted with this question. For, if such a court had been confronted with such a question, the parties to such litigation would have been bound thereby for title purposes, as I have indicated earlier, whether or not something was filed with the register of deeds.

In this connection, the plaintiffs and the intervenor seem to suggest that no court could come to a conclusion

that no title defect existed due to the holdings of two Nebraska Supreme Court cases. This argument essentially begs the question, for it asks me to assume that the records of the clerk of the state district court contain no judgment adverse to the condemnees or their heirs. If the records of the clerk of the state district court contained such a judgment, then it would have been binding on the parties to the litigation, as I have indicated earlier, and there would be no "title defect." In any event, the two cases relied upon by the plaintiffs and the intervenor do not in my opinion stand for the proposition that railroads were prohibited from obtaining fee simple title in 1882 by condemnation.

The principal case relied upon by the plaintiffs and the intervenor is *Roberts v. Sioux City Pac. R.R.*, 73 Neb. 8, 102 N.W. 60 (1905), where the railroad *won* an adverse possession case because it was *undisputed* that the railroad had simply a right of way. In that case the railroad had condemned a right of way, ~~two~~ hundred feet wide, through farmland and had taken a deed for an easement for a right of way, two hundred feet wide, through other farmland. Later the owner of the land subject to condemnation, the same person who signed the deed and who also owned the adjoining farmland, sued, claiming that he had adversely possessed against the railroad and was entitled to use part of the right of way. There was no dispute about what the "appropriation" was in *Roberts*: "Defendants claim a right of way through plaintiff's land . . . . Plaintiff admits that they have a right of way . . . ." *Id.*, 73 Neb. at 10, 102 N.W. at 61. The Nebraska Supreme Court essentially concluded that since the railroad had only a right of way, or easement, the farmer could not

adversely possess against the railroad without giving unequivocal notice because the farmer owned the servient estate. The court stated:

> [A] railroad company acquiring its right of way by condemnation proceedings under the Constitution and laws of this state does not obtain fee title thereto. It secures merely an easement in the right of way . . . . The fee title and servient estate remains in the original owner . . . . In the very nature of things, the railroad cannot dispose of, alienate, or even lease its easement for any purpose except for operation of the railroad; and whenever the right of way is abandoned for that purpose it reverts at once to the owner of the servient estate. Such was the right obtained by the railroad company to the land in controversy in this case. Therefore it is not manifest to us how title or right to this easement of the company can be obtained by a third person by adverse possession . . . .

Id. at 23, 102 N.W. at 65.

It therefore appears doubtful to me that the Nebraska Supreme Court was confronted with the issue of whether railroads in 1882 were prohibited from acquiring fee title to real estate in a condemnation proceeding when such was the intent of the railroad. It should be remembered in this regard that Neb. Rev. Stat. § 98-81 (1881) uses the word "right of way" in the context of a "right of way over adjacent lands" and the use of the preposition "over" seems to imply a lesser taking than other grants of power described in the same statute, such as: "Such corporation . . . may take, hold, and appropriate so much real estate as may be necessary for the location construction and convenient use of its road, including all necessary grounds for stations, buildings, workshops, depots" and

the like. Neb. Rev. Stat. § 98-81 (1881). This distinction is particularly critical in this case because, unlike the two hundred foot right of way through farmland in *Roberts*, the railroad here condemned blocks in downtown Omaha, Nebraska, "and the whole thereof," some which contained improvements. For these reasons it would be inappropriate to extend *Roberts*, a case where there was no dispute about what the "appropriation" was, to this case, where the "appropriation" was arguable intended to constitute a fee simple taking.

At this point I note that the plaintiffs and the intervenor refer in their brief to a portion of the statutes existing in 1882 setting out one procedure for condemnation that refers only to a "right of way." Plaintiffs' Post-Trial Brief at 3-4 (quoting Neb. Rev. Stat. § 98-97 (1881)). From this, the plaintiffs and the intervenor argue that the only interest a railroad could acquire was a "right of way." In contrast, the defendants point out in their brief the provisions of Neb. Rev. Stat. § 98-95 (1881), which suggest to them that a county court could allow a condemnation of fee simple title, where the parties consent to condemnation, but disputed the damages. *Id.* at 78-79. Thus, the defendants argue that this other procedure was utilized in the instant case.

I am unconvinced by both arguments. First, it is not plain to me what procedure was employed in the instant case, and there is no factual record upon which one can adequately determine the matter because the 1882 condemnation proceeding does not refer to the procedural statute used, and the petition of condemnation is not a part of the record. Second, what I do know is that the *substantive* statute, Neb. Rev. Stat. § 98-81 (1881) does not

on its face seem to prohibit a condemnation of a fee simple interest, whether consent is given or withheld by the landowner, and, accordingly, I would be loath to interpret *either procedural* statute to limit the reach of the substantive statute, absent clear direction from the Nebraska Supreme Court. I find no clear direction from the Nebraska Supreme Court.

The second case relied upon by the plaintiffs and intervenor is *Lillich v. Lowery*, 211 Neb. 757, 320 N.W.2d 463 (1982). In that case the court was asked to construe a deed that contained language granting a fee simple interest to some farm ground, "excepting the present right-of-way of the [railroad] across said lands." *Id.* at 759, 320 N.W.2d at 464. The right of way was one hundred feet wide, through an eighty-acre tract, and it had been acquired by condemnation. *Id.* at 758, 320 N.W.2d at 464. The issue, once again, was not whether the railroad had acquired a mere easement, as the parties agreed on this point: "[T]he facts do not seem to be in dispute. . . . The defendants allege in their cross-petition, which is admitted by the plaintiff's reply, that the 100-foot-wide strip of land previously described 'constituted an easement for a railroad right-of-way which easement terminated upon the abandonment of the railroad in 1976.' " *Id.* at 758-59, 320 N.W.2d at 464. Rather, the issue was whether a deed conveying a tract of land, excepting an easement over a portion of the ground, retains in the grantor, or conveys to the grantee, the fee simple title to the land underlying the easement. The court held that a conveyance of land, excepting an easement, also conveys the land underlying the easement to the grantee. In so holding, the court recognized *Roberts* and stated that "we have held that a

railroad company which acquires its right-of-way by condemnation proceedings secures merely an easement in the right-of-way," *id.* at 759-60, 320 N.W.2d at 464, and, quoting *Roberts*, emphasized that upon abandonment of the easement, the fee title " 'reverts at once to the owner of the servient estate.' " *Id.* (emphasis deleted) (quoting *Roberts*, 73 Neb. at 22, 102 N.W. at 65).

Essentially for the same reasons that I have concluded that *Roberts* is unpersuasive authority for the proposition that a railroad in 1882 was prohibited from acquiring fee title by condemnation when the railroad intended to do so, I conclude that *Lillich* is also unpersuasive for that same proposition.

I thus conclude that the limited title searches of Ms. Schrat and Mr. Daum would be of little value to the court. Put simply, absent a judgment search of the records of the clerk of the district court of the county wherein the real estate is situated looking for judgments in favor of or against persons who appear in the chain of title, one cannot express an opinion of value as to whether the Railroad, the original condemnees or the heirs of the original condemnees had or have fee simple title.

Next, I received into evidence copies of the register of deed indexes and documents referred to in the indexes (Exhibits 3003 through 3027A (*See* Testimony of George J. Buglewicz, Register of Deeds of Douglas County, Vol. VI, TR 1343:23-1366:14; Testimony of Lucille Wisinski, employee in the office of Mr. Buglewicz, Vol. VI, TR 1366:17-1381:9)); essentially, these copies are what Ms. Schrat and Mr. Daum would have examined when they conducted their limited title searches. I received these

exhibits into evidence because these records have relevance to establishing a partial chain of title, and were not other wise objectionable. Perhaps regrettably for them, the plaintiffs and the intervenor never supplemented these exhibits by judgment searches of the records of the clerk of the district court. Thus, for the reasons expressed above regarding the lack of usefulness of the title searches, I cannot simply assume, which is what the plaintiffs and the intervenor would have me do, that there is nothing bearing on the state of the title in the office of the Clerk of the District Court for Douglas County, Nebraska. The documents from the register of deeds office simply did not establish each necessary link in the chain of title.

I note that just before entering their rest at trial (Vol. VIII, TR 1788:8-1792:3), the plaintiffs and the intervenor did ask me to take judicial notice of the records of the District Court of Douglas County, Nebraska, or to appoint an expert for the court to conduct the judgment search. I declined both requests for a number of reasons, some of which I shall briefly restate. I emphasize that the plaintiffs and the intervenor were well aware that they had an obligation to designate experts as required by the progression order, but they failed to do so. When they asked for leave to designate experts out of time, just days before trial, the plaintiffs and the intervenor, when offered an opportunity for a continuance, declined the offer. (Filing 422). Thus, it appeared that the plaintiffs and the intervenor were trying to do indirectly what they could not do directly – and that was to supply the evidence for establishment of chain of title necessary to prove their claims by having the court do their work.

With regard to taking judicial notice of the records of the Clerk of the District Court of Douglas County, Nebraska, such a request was improper because: the "facts" were not generally known within the territorial jurisdiction of this court, and the "facts" were not capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201. Essentially, the plaintiffs and the intervenor asked me to personally examine the records of the clerk of the district court, determine whether or not there were records pertinent to their claim, and then take judicial notice of such records. The plaintiffs and the intervenor did not know what the records were or what they reflected, nor did I. The plaintiffs and the intervenor were asking me to search all the records of the district court for judgments since 1882 pertaining to the subject real estate (either a general judgment or a judgment pertaining to the subject real estate specifically) which were either entered for or against the Railroad or its predecessor, and the original condemnees or the *unnamed* heirs of the original condemnees. I note that no search of the probate records, maintained by the clerk of the *county* court, not district court, was done. Thus, it is impossible to determine who the heirs of the original condemnees were without a search of the probate records. Without knowing these names it would not be possible to ascertain whether a judgment was entered for or against them in the district court in favor of the Railroad or its predecessor, unless every file in the district court to which the Railroad or it predecessor was a party was examined. As a consequence, I believe that it would be improper to take

judicial notice of these "facts" under Federal Rule of Evidence 201(b) & (d).

Furthermore, since the plaintiffs and the intervenor had not timely endorsed their own expert, they requested that the court appoint an expert to examine the records and supply the evidence that they had declined to supply. There is no doubt that the trial would have been substantially delayed by the appointment of an expert if the procedures outlined in Federal Rule of Evidence 706(a) were to be followed, and, of course, such procedures would have been followed. The delay in the trial in light of the fact that the plaintiffs and the intervenor had once rejected a continuance is reason enough to refuse to appoint an expert. An even more compelling reason to deny the appointment of an expert is that it is not the proper office of a court-appointed expert in a civil case to provide evidence which the parties had every opportunity to provide, but failed to provide. This is not a case where the finder of fact is confronted with two divergent expert opinions, and the finder of fact requires the services of an objective expert to determine the validity of the competing position. Rather, this is a case where the expert is sought to prove an element that a party failed to prove. Such a procedure unnecessarily injects the court into the adversarial process and subverts the purposes of Federal Rule of Civil Procedure 16 requiring the parties to prepare in advance of trial and to comply with scheduling orders.

B.

I turn next to the second argument advanced by the plaintiffs and the intervenor that a conversion or

threatened conversion is about to take place. Essentially, the plaintiffs and the intervenor argue that if the Burlington Northern Railroad had title to the park property, the Railroad conveyed not only the property described in the metes and bounds portion of the legal description of the deed, but also its title to a portion of vacated streets lying adjacent to real estate described by metes and bounds (7th Street adjacent to Blocks 131 and 155). The City is now endeavoring to condemn a portion of the vacated streets, so claim the plaintiffs and the intervenor. Therefore, the plaintiffs and the intervenor argue that the County is allowing the City to convert the vacated streets from public outdoor recreation use to some other purpose by virtue of the condemnation. Plaintiffs' Post-Trial Brief at 18-21. The plaintiffs and the intervenor argue essentially that the County accidentally acquired more property than it thought it was acquiring, the park property is larger by one half of a vacated street, and the vacated street portion is being condemned by the City. Hence, a conversion has taken place of at least a portion of the park.

I need not decide the questions of intricate and arcane real property law dealing with vacation of streets, for the factual predicate for the conversion argument – that is, the County's interest is being condemned – is not supported by the evidence. The plaintiffs and the intervenor rely upon exhibits 3110 and 3111, which are copies of condemnation petitions, in support of their argument that a portion (east half of vacated seventh street lying adjacent to Blocks 131 and 155) of the County's park property is being condemned. Plaintiffs' Post-Trial Brief at 18. The problem with this argument is that the County

is not named as a condemnee on the relevant tracts, whereas every other interested person is so named (e.g., Exhibit 3111, First Amended Petition to Condemn, caption tracts 5A-5D, and paragraph 3, tracts 5A-5D). (The only condemnee related to the County is "Sam J. Howell, Douglas County Treasurer," and he is named apparently as a tax collector along with the Board of Equalization of the State of Nebraska.) Clearly, according to the theory of the plaintiffs and the intervenor, the County holds a record interest by virtue of recordation of its special warranty deed, in the same "County of Douglas." (Exhibit 3000). To properly name the County as a condemnee it would have to be described as the "County of Douglas." Neb. Rev. Stat. § 23-101 (Reissue 1987); *Jameson v. Plischke*, 184 Neb. 97, 99, 165 N.W.2d 373, 375 (1969). Thus, whatever the City is doing, the City does not threaten by condemnation any interest of the County, since the City did not name the County as a condemnee. *See* Neb. Rev. Stat. §§ 76-701 to -725 (Reissue 1986 & Cum. Supp. 1988) (describing the procedure for condemnation generally, and providing for notice to condemnees, Neb. Rev. Stat. § 76-706 (Cum. Supp. 1988)).

C.

The title issue raises questions of whether the original condemnees and their heirs must be made parties to the litigation such that the failure to join them requires dismissal of this case pursuant to Federal Rule of Civil Procedure 19(b). The defendants raise only arguments regarding these absent parties, and no others, and defendants argue that these parties are "indispensable" such

that the court cannot provide adequate relief. Post-Trial Brief of Defendants at 59-64.

I assume that this litigation has the potential to indirectly adversely impact upon the original condemnees and their heirs, and that joinder is not feasible under Federal Rule of Civil Procedure 19(a). However, the rule is well established that "[i]n litigation involving the adjudication of public rights, nonparties who may be adversely affected by a decision in plaintiff's favor do not have a protectable interest which would require their joinder." 3A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 19.07 [2. – 0] (2d ed. 1987). *See National Resources Defense Council, Inc. v. Berklund*, 458 F. Supp. 925, 933 (D.D.C. 1978), *aff'd*, 609 F.2d 553 (D.C. Cir. 1979) (stating that, in an action brought by environmental organization seeking declaratory relief with respect to the issuance of preference right coal leases, the joinder of lease applicants was not required, since the plaintiffs were solely seeking vindication of the public rights embodied in the NEPA). Here the plaintiffs and the intervenor seek *solely* to vindicate public rights under NEPA and NHPA. I believe, therefore, that complete relief can be provided since the relief sought is not a declaration of specific rights to the real property, but rather compliance with NEPA and NHPA. Accordingly, I believe that joinder is not required and dismissal is not mandated under Federal Rule of Civil Procedure 19(b).

IV.

At trial the parties offered into evidence various depositions wherein certain objections were made, but

consented that I might defer ruling on these depositions until I could read them. I have reviewed the depositions, and now receive them into evidence, over the objections made, for whatever value the depositions may have, if any. (Exhibits 4011 through 4016). I have considered all dispositive motions made before, during and after trial, and to the extent that I have authority to rule upon such motions I deny them, and to the extent that I lack authority to rule upon such motions I recommend that they be denied, but that this case be decided upon these findings and recommendations and the previous findings and recommendations (filing 261).

IT IS RECOMMENDED TO THE HONORABLE WARREN K. URBOM THAT THE COURT:

1. find in favor of the defendants and against the plaintiffs and intervenor as provided for in these findings and recommendations and the previous findings and recommendations (filing 261), determining that:

a. based upon the existing Riverfront Redevelopment Agreement (including all approved plans, specifications, and construction drawings as of July 11, 1988), there is no federal funding, federal licensing or other federal involvement requiring a section 106 review under the NHPA, or otherwise implicating the NEPA or the LWCFA:

b. insofar as the ODF and ConAgra are concerned, a section 106 review (or other action required under the NHPA, the NEPA or the LWCFA) could not result in a federally required retention of one or more buildings in Jobbers Canyon;

c. the Trust does not have the statutory capacity to sue the federal defendants, but the Trust does have the statutory capacity to sue the nonfederal defendants;

d. the Trust has standing for itself and its members to bring this action;

e. PROUD lacks standing for itself, but PROUD has standing for its members;

f. Roger Durand has standing;

g. Mercer Management Company has standing for itself;

h. the court has before it appropriate parties such that adequate relief can be provided by the court;

2. deny all dispositive motions at any time made by any party; and

3. enter final judgment in favor of the defendants and against the plaintiffs and intervenor, dismissing this case.

DATED this 20th day of January, 1989.

/s/ Richard G. Kopf
Richard G. Kopf
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PEOPLE FOR RESPONSIBLE OMAHA URBAN DEVELOPMENT, et al., Plaintiffs, NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES, Intervenor, vs. INTERSTATE COMMERCE COMMISSION, et al., Defendants.	CV88-0-247 MEMORANDUM ON PLAINTIFFS' AND INTERVENOR'S OBJECTIONS TO THE MAGISTRATE'S FINDINGS OF LAW AND FACT AND THEIR MOTION TO REJECT PART OF THE MAGISTRATE'S RECOMMENDATIONS (Filed Febr. 14, 1989)

The plaintiffs and intervenor have filed objections to the report and recommendations made by Magistrate Kopf following the second portion of a bifurcated trial, filing 468. The defendants, who filed their objections to the magistrate's findings and recommendations later than 10 days following the filing of the magistrate's opinion, objected to the magistrate's conclusion that each of the plaintiffs and the Intervenor had shown facts at trial sufficient to establish standing. I have reviewed the transcript of the trial and the portions of the magistriate's report that concern these issues and I conclude that the report contains no clearly erroneous findings as to the standing issues. Therefore, I shall adopt the magistrate's

recommendations as to the standing of P.R.O.U.D., Roger Durand, Mercer Management Company and the National Trust for Historic Preservation ("National Trust"). *See* Recommendations (d), (e), (f), and (g).

The National Trust, the intervenor in this case, has objected to the magistrate's finding that it lacks the capacity to sue the federal defendants. The magistrate determined that the National Trust had capacity to sue the nonfederal defendants, but he found that, despite its power "to sue and be sued" under 16 U.S.C. § 468c(b), the National Trust lacked capacity to sue the federal defendants because the Trust failed to overcome the obstacles to capacity that were outlined in *Federal Housing Admin. v. Burr*, 309 U.S. 242 (1940). The magistrate determined that permitting the National Trust to sue federal defendants would be inconsistent with the statutory scheme for historic preservation in the United States and would constitute a grave interference with significant governmental functions. The federal defendants, who argued at trial that the National Trust lacked capacity to sue them, have since abandoned their position, filing 478.

The intervenor agrees with the basic approach used by the magistrate to determine whether the Trust has capacity to sue. As the magistrate recognized, any limitation on the power of the National Trust to sue or to be sued "cannot be lightly assumed." *Burr*, 309 U.S. at 245. The *Burr* test, which was reaffirmed in *Loeffler v. Frank*, 56 U.S.L.W. 4554, 4555 (U.S. June 13, 1988), established that "if the general authority to 'sue and be sued' is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the

statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense." *Burr*, 309 U.S. at 245.

STATUTORY LANGUAGE AND POLICY

Like the magistrate and the intervenor, I shall begin my analysis with an examination of the statutory language of 16 U.S.C. § 468 (1985):

> In order to further the policy enunciated in sections 461 to 467 of this title, and to facilitate public participation in the preservation of sites, buildings, and objects of national significance or interest, there is hereby created a charitable, educational, and nonprofit corporation, to be known as the National Trust for Historic Preservation in the United States, hereafter referred to as the "National Trust". The purposes of the National Trust shall be to receive donations of sites, buildings, and objects significant in American history and culture, to preserve and administer them for public benefit, to accept, hold and administer gifts of money, securities, or other property of whatsoever character for the purpose of carrying out the preservation program, and to execute such other functions as are vested in it by sections 468 to 468e of this title.

Upon considering this and the other language that constitutes the federal charter, the magistrate decided that the primary function of the National Trust is "to serve the goal of preservation of historical sites by acquisition, lease, contract, loan or the like." MFAR II, at 38.

The magistrate concluded that the statutory language is incapable of being read to suggest that the Trust may sue federal agencies for the purposes of forcing a section 106 consultation. He noted that the only place in the statutory provisions where federal agencies are mentioned is in section 468c(g), which refers to the Trust's power to contract and to make other cooperative agreements with federal agencies, and he found that this section emphasizes the need for a cooperative posture between federal agencies.

The intervenor argues that the only issue regarding its capacity to sue a federal agency concerns whether a function of the National Trust is to attempt to save historical buildings from demolition by lawsuit. Not surprisingly, the Trust answers its own question affirmatively and takes issue with the magistrate's narrow interpretation of the corporation's functions.

The policy enunciated in section 461, which is referred to in the first sentence of section 468, is "to preserve for public use historic sites, buildings and objects of national significance for the inspiration and benefit of the people of the United States." 16 U.S.C. § 461. The intervenor argues that the policy articulated in section 461, combined with the policy of "facilitat[ing] public participation in the preservation of sites, buildings, and objects of national significance or interest," indicates that a function of the National Trust is to institute lawsuits "to preserve [historical sites and buildings] for public benefit," regardless of whether the defendants are federal agencies.

I agree with the intervenor that, based solely upon an interpretation of the statutory language of the National Trust's charter, the primary function of the Trust is not as narrow as the magistrate's report implies. However, I also acknowledge that the breadth of the Trust's functions, including its right to sue and be sued, may be limited by the concerns expressed in *Burr*. A useful resource for determining whether *Burr's* limitations apply to limit the Trust's capacity to sue is the legislative history of the laws involving the nation's historic preservation efforts.

The legislative histories of four statutes have bearing on the issues presented in this case: the creation of the National Trust in 1949; the passage of the National Historic Preservation Act in 1966; and amendments to the latter in 1976 and in 1980, which includes the attorney's fee award provision. The magistrate and the intervenor devoted considerable attention to these documents in formulating their positions on the issue of the Trust's capacity. I have done the same.

In the interests of time and of judicial economy, I shall not repeat the legislative histories, except where necessary. Suffice it to say that I have read the documents that constitute the legislative histories of the above-listed statutes, including the portions that the magistrate relied upon in formulating his recommendation and including the portions that the intervenor relies upon in objecting to the recommendation. *See generally*, H.R. Rep. No. 855, 81st Cong., 1st Sess., *reprinted in* 1949 U.S. Code Cong. & Admin. News 2285; H.R. Rep. No. 1916, 89th Cong. 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Admin. News 3307-3319; S. Rep. No. 1363, 89th Cong., 2d Sess. 1 (1966); S. Rep. No. 367, 94th Cong. 2d Sess., 33-34, *reprinted in*

1976 U.S. Code Cong. & Admin. News 2442; H.R. Rep. No. 1457, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 6378, 6409; and S. Rep. No. 943, 96th Cong., 2d Sess., 1 (1980).

I have also read the Illinois Supreme Court's opinion in *Landmarks Preservation Council of Illinois v. City of Chicago*, 125 Ill. 2d 164, 531 N.E.2d 9 (1988). I agree with the Illinois court's conclusion that the "National Trust must be allowed to maintain suits in State courts to prevent unlawful destruction of buildings it deems of national historic significance." *Id.* at ___, 531 N.E.2d at 14. However, I also agree with the magistrate's conclusion that this case is not particularly helpful in deciding whether the Trust has capacity to sue federal agencies since the defendants in that case were not federal agencies.

Based upon my review of the statutes, the legislative history, case law, and the trial transcript, I have decided to reject the magistrate's recommendation regarding the Trust's capacity to sue federal defendants. I find no evidence in the record that the Trust's capacity to sue a federal agency is inconsistent with the statutory scheme or presents a grave interference with the undertakings of a federal agency. I am not oblivious to the difficulties that may be presented when the Trust sues the director of a federal agency who is also a statutorily designated member of the Board of Trustees. However, I do not think it has been shown that the Secretary of the Interior cannot simultaneously perform his duties as secretary and as a Trustee. The problems that were identified by the magistrate do not rise to the level that is required by *Burr* and *Loeffler*.

The issues raised in *Burr* and *Loeffler* concern the scope of the federal instrumentalities' "sue and be sued" clause. This case assumes a posture different from those cases because this case concerns the National Trust's right to initiate a lawsuit, rather than a federal agency's exposure to suit.

FEDERAL INSTRUMENTALITY

As a preliminary matter, I shall address the intervenor's argument that it is not, as the magistrate's findings reflect, a federal instrumentality. Because the character of the National Trust is important to the ultimate resolution of this capacity issue, I shall analyze its nature. The National Trust contends that it is a private, nonprofit corporation. It notes that its activities are not subject to review by the federal government, that it is not bound by the requirements of the Administrative Procedures Act, that it is independently run by its Board of Trustees who are not appointed by the President, that it is not represented by the Justice Department, and that the Court of Claims has determined that it is not a federal entity for purposes of the Tucker Act, *see Chas. H. Tompkins Co. v. United States*, 230 Ct. Cl. 754. (1982).

The Trust's charter refers to it as "a charitable, educational and nonprofit corporation," *see* 16 U.S.C. § 468, and I note that three of the members of its Board of Trustees are statutorily required to be public: the Secretary of the Interior, the Attorney General and the Director of the National Gallery of Art, *see* 16 U.S.C. § 468b.

I observe that the Trust is not one of the "private corporations established under Federal law" that are listed at 36 U.S.C. § 1101, and that Congress did not designate the Trust as such in its Federal charter, as it did with the National Fish and Wildlife Foundation, *see* 16 U.S.C. § 3706. Though it is not purely private, the Trust possesses many of the qualities identified by the Supreme Court as indicative of private status.

In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 55 U.S.L.W. 5061 (U.S. June 25, 1987), the Court considered whether the USOC activities could constitute state action for purposes of an action under 42 U.S.C. § 1983. While it is true that the USOC is listed as a private corporation created under federal law in 36 U.S.C. § 1101, the factors that the Supreme Court considered in analyzing the nature of the USOC may aid my analysis of the nature of the National Trust. The Court stated:

> The fact that Congress granted it a corporate charter does not render the USOC a government agent. All corporations act under charters granted by a government, usually by a State. They do not thereby lose their essentially private character. Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government.

Id. at 5067. The court also found that Congress' intent to aid the USOC with funding did not make the entity the government's agent. "That a private entity performs a function which serves the public does not make its acts [governmental] action." *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). In describing the federal charter for the USOC, the Court stated:

> The Act merely authorized the USOC to coordinate activities that always have been performed by private entities. Neither the conduct not the coordination of amateur sports has been a traditional governmental function. . . .'Normally [a government] can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government].'

Id. at 5067 *quoting Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Like the USOC, the National Trust does not become a federal entity based solely upon its federal charter, and like the USOC, the National Trust does not become a federal entity by virtue of its eligibility to receive federal matching grants-in-aid. Moreover, historic preservation efforts have not traditionally been a governmental function and, in fact, the Congress has made it clear in the legislative history that the private individuals and organizations are better equipped to pursue these efforts.

Given this information, I am inclined to believe that the National Trust, albeit with three public Trustees on its Board, is more private than public in nature. My inclination is affirmed by the legislative history of subsequent acts touching on the historic preservation effort. In the legislative history from the National Historic Preservation Act in 1966, a letter from the Secretary of the Interior was included in the Senate Report. The letter stated in part:

> It [the National Trust] is the only *nongovernmental* body operating on a nationwide basis in the historic preservation field.

S. Rep. No. 1363, 89th Cong., 2d Sess. (1966) at 13 (letter from Stewart L. Udall) (emphasis added). When the attorney's fee provision was passed, permitting all interested persons who "substantially prevail" in a suit brought under the NHPA to obtain their fees, the House report stated that the "any interested persons" referred to individuals and "non-profit organizations" who prevail. H.R. Rep. No. 1457, 96th Cong., 2d Sess. (1980). By the language of its charter, the National Trust is a nonprofit organization. 16 U.S.C. § 468.

It seems to me that the magistrate's primary concern was with what he saw as the clear intent of Congress that federal agencies and instrumentalities should work in cooperation to achieve the goals of historic preservation. He relied on the matching grants-in-aid provision for the Trust, the development of the consultation process under section 106, and the original character of the Advisory Council as solely "advisory." He also maintained that Congress' intent in creating the Advisory Council was to present a forum where unbiased and objective decisions could be reached.

Congress' demand for cooperation is also evident, according to the magistrate, in its decision to designate the Attorney General and the Secretary of the Interior to sit on the National Trust's Board of Trustees and in designating the Chairman of the National Trust and the Secretary of the Interior as members of the Advisory Council. The magistrate concluded that "[q]uite clearly," Congress did not intend for the Trust to be independent.

Magistrate Kopf also considered the fact that Congress withdrew the Attorney General's statutory membership of the Advisory Council at the same time that Congress permitted the Advisory Council to institute legal proceedings under the NHPA as indicative of Congress intention to keep federal agencies that have the power to sue separate from the Justice Department. The intervenor pointed out, however, that the Attorney General was removed along with several other members of the Board of Trustees in an attempt to decrease the total Board membership. *See* S. Rep. No. 943, 96th Cong., 2d Sess. at 13.

Though Magistrate Kopf's observations about the contents of the legislative histories are accurate, I disagree with the inferences that he has drawn from them. The *Burr* test requires a court to make legal and factual determinations with regard to the reality of the situation. The defendants presented no evidence to demonstrate that the Secretary of the Interior, Mr. Hodel, feels that his statutory duties as secretary of the Interior are inconsistent with his duties as a Trustee. Nor have the defendants shown that Mr. Hodel's duties as the secretary pose a grave interference to his ability to meaningfully participate as a Trustee or that his status as a Trustee poses a grave interference with his duties as secretary. In short, there has been no demonstration that the Secretary is unable to perform his statutory duties satisfactorily. The defendants' challenge to the Trust's capacity, therefore, must fall of its own weight.

DEFECTIVE TITLE TO THE PARK LAND

The other major issue presented in this second phase of the trial pertains to whether Douglas County's title to

the majority of the land that is now part of the park property is defective in any way, and if the title is defective, then whether the defect constitutes a conversion of the land under the LWCFA. The intervenor and the plaintiffs object to the magistrate's conclusion that defective title was not proved. They rely heavily upon certified records from the Douglas County Register of Deeds office, upon an abstractor's certificate compiled by Frank J. Drelicharz in 1983, and upon Drelicharz's testimony to show that defective title exists.

The magistrate ruled before trial and again at trial that the title searches performed by Sherri Schrat for the Omaha Development Foundation, a defendant, were privileged under the work product doctrine and, therefore, the plaintiffs and intervenor were precluded from using evidence regarding the searches or the conclusions that Mrs. Schrat drew from them at trial. He also decided that certain testimony by Mrs. Schrat, if allowed into evidence, would not constitute lay opinion under the Federal Rules but rather would constitute expert testimony. However, because the parties had not designated her as an expert in the pretrial order, she would not be allowed to testify in that capacity. *See* filing 420, and MFAR II at 1508-1511.

The plaintiffs and intervenor object to this ruling for many reasons. They argue that the searches were performed before the title defect became an issue in the case, and that in any event, ODF waived the privilege by its actions. Specifically, they contend that other title searches that were performed by Mrs. Schrat had been provide to the plaintiffs and intervenor in discovery and that Mrs. Schrat stated that no greater degree of secrecy pertained

to the searches in question than to the previously disclosed searches. Additionally, they contend that Mrs. Schrat testified that she discussed the conclusions that she had drawn from the searches in question with other parties, including Drelicharz and an attorney for the plaintiffs and intervenor.

I conclude that the magistrate's decision not to receive the evidence was proper for the reasons that he provided at trial. The plaintiffs and intervenor apparently have argued nothing new in their brief to me, and I do not find their original arguments any more persuasive than did the magistrate. With this evidentiary objection out of the way, I shall consider the substantive objections.

The magistrate's findings first addressed whether a conversion may occur under the LWCFA based on a possible defect in the title. He found that a theoretical title defect fails to threaten the County's title to the land because in a theoretical situation, there is no evidence that the property would be converted to any use other than public outdoor recreational use as a park. He stated that the plaintiffs and intervenor failed to adduce any evidence that the title defect threatened to change the use of the park, noting that they were unable to demonstrate that there were any real claimants who threatened to divest the county of title or otherwise to convert the use of the land. Although he made reference to a letter from an attorney that was addressed to the City, which the plaintiffs and intervenor asked him to receive after the record had been closed, the magistrate decided not to allow the letter into evidence. Stating that the conversion argument was nothing but theoretical, the magistrate

concluded that the plaintiffs and intervenor did not satisfy their burden of proof on the conversion issue.

Since January 20, 1989, the date the magistrate filed his findings and recommendations, a petition to quiet title to some of the land in question in this case has been filed in the Douglas County District Court. The plaintiffs and intervenor have filed a motion asking me to accept further evidence in this case. Although the time allotted for the defendants to respond to the motion has not yet expired, I shall proceed as if the evidence were received, because I find that it would not significantly bear on the outcome of this case. The petition to quiet title indicates that a part of the plaintiffs' and intervenor's conversion argument has become more than purely theoretical. Nevertheless, I agree with the magistrate that the assurances provided by the title insurance alleviate the threat to conversion.

The magistrate found that even if the plaintiffs and intervenor could show that a defect existed, they did not show that the defect would constitute a conversion under the LWCFA. The magistrate rejected their use of *Friends of Shawangunks v. Clark*, 754 F.2d 446, 451 (2nd Cir. 1985)[1] and found that the County's possession of a Special Warranty Deed and the evidence that the County had title insurance demonstrated that the County's title to the land would be rigorously defended. He noted that the Special Warranty Deed gave the County at least two assurances.

---

[1] The plaintiffs and intervenor cite *Friends* for the proposition that a conversion includes instances in which "[p]roperty interests are conveyed for non-public outdoor recreational uses." *Id.* at 451. (emphasis omitted).

First, that the railroad was lawfully seised of the land that it conveyed and, second, that the railroad would defend its title against any lawful claims made through, by or under the railroad. He put significant weight upon the fact that the County had procured title insurance on the land in the amount of $543,000 that could be used to satisfy any claims arising from a claim of title defect. *See* Exhibit 3076. This discussion seems to me to address the "real question" that was identified in the plaintiffs' and intervenor's brief: Can the County *assure* the National Park Service that it has title, control or tenure over the land? Plaintiffs' and Intervenor's Brief at 58. *See* 16 USC § 460l-8(f)(3). The magistrate's conclusion is that the County can assure its control over the land, and based on the evidence, I cannot say that this conclusion is clearly erroneous.

The magistrate also concluded that, in any event, the plaintiffs and intervenor failed to show chain of title in another and, therefore, they failed to show that there had been a conversion under the *Friends* case. As the magistrate found, four methods of presenting prima facie evidence of title exist in Nebraska: by having an abstract prepared by a licensed abstractor, by providing a complete title insurance policy, by hiring an expert to perform a title search and to give an opinion as to the title at trial, and by copying and having received into evidence all pertinent public records that show proper title. The magistrate determined that the plaintiffs relied on limited title searches performed by nonexperts, some of which were not received by him at trial, and upon certified records from the Register of Deeds office in Douglas County to

establish title. He decided that neither of these methods was effective.

Magistrate Kopf noted that in Nebraska instruments concerning land may be valid between parties even if they are not recorded, Neb. Rev. Stat. §76-238 (Reissue 1986), and that the land of a debtor is bound by the judgment of any court in Nebraska, Neb. Rev. Stat. § 25-1304 and § 25-1305. He concluded that the plaintiffs and intervenor failed to prove that a defective title exists, primarily because there was no evidence that any qualified person performed a search of the judgment books of the Douglas County District Court.

The intervenor and plaintiff argue, however, that the Burlington Railroad lacked the power to deed title to the land to the county since, under the Nebraska Constitution and Nebraska case law including *Lillich v. Lowery*, 211 Neb. 757, 320 N.W. 2d 463 (1982) and *Roberts v. Sioux City & Pac. R.R. Co.*, 73 Neb. 8, 102 N.W. 60 (1905), a railroad that takes a right-of-way in land by condemnation receives only an easement in the real estate for railroad purposes, and that the rights in the land revert to the servient estate upon abandonment by the railroad. The plaintiffs and intervenor rely on Exhibit 3001, the Report of the Commissioners from 1882, which, they say, indicates that the Burlington Northern's predecessor obtained a right-of-way to the land that now constitutes part of the land to be used for the park. The plaintiffs and intervenor contend that in 1984, when the Burlington Railroad transferred by Special Warranty Deed the land that had constituted its right-of-way, the railroad abandoned its easement and the rights in the use of the land

reverted to those who owned the servient estates in 1882 and their heirs.

The *Lillich* and *Roberts* cases did not persuade the magistrate that the only interest that the Burlington Northern's predecessor could have obtained in 1882 was an easement. The transfer between the original condemnees and the railroad took place in 1882, before *Lillich* and *Roberts* were decided by the Nebraska Supreme Court, and under a statute that was not in effect at the time those cases were decided. He found that the statute was open to an interpretation that would have provided for the railroad to take greater rights in the land than an easement, including the possibility that the railroad was to receive a fee title interest in the land. I agree that the statute in place in 1882 need not necessarily be construed in the narrow manner that subsequent statutes were construed by the Nebraska Supreme Court.

The plaintiffs and interveners contend that the defective title is established by Drelicharz's testimony and Exhibit 3078. The exhibit is an abstractor's certificate that was completed in 1983 pursuant to an investigation that preceded the issuance of title insurance in favor of the County. The plaintiffs and intervenor emphasize that Drelicharz, who is a licensed abstractor, testified that he completed judgment searches, a probate search and a tax lien search in connection with the issuance of the abstractor's certificate.

I observe that Exhibit 3078, the product of Drelicharz's title search that is in evidence, is an abstractor's certificate. It is not an abstract and it does not constitute copies of all the pertinent records. Drelicharz was not

designated as an expert at the pretrail conference, though he is a licensed abstractor. I see no way that Exhibit 3078 and Drelicharz's testimony can suffice to prove title in Nebraska. Thus, I agree with the magistrate's conclusion that the plaintiffs and intervenor have failed to show a title defect and that they have failed to show a conversion under the LWCFA.

OTHER ISSUES

The magistrate took little time to conclude that the County's interest in the east half of vacated Seventh Street, which adjoins portions of blocks 131 and 155, is not in jeopardy based on the City's condemnation action since the County is not a defendant in the action. Exhibits 3010 and 3011. I agree. I also agree with the magistrate's conclusion that all necessary parties were joined in this action, because the action involves public rights and, therefore, joinder is not required.

Dated February 14, 1989.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PEOPLE FOR RESPONSIBLE OMAHA URBAN DEVELOPMENT (PROUD), *et al.*, Plaintiffs-Appellants, NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES, Intervenor-Appellant, vs. INTERSTATE COMMERCE COMMISSION, *et al.* Defendants-Appellees.	CASE NO 89-1342 NE OMAHA DEVELOPMENT FOUNDATION'S MOTION AND MEMORANDUM TO DISSOLVE THE INJUNCTION DATED MARCH 1, 1989, OR TO REQUIRE THE PLAINTIFFS AND INTERVENOR TO POST A SUFFICIENT SURETY BOND

COMES NOW the Defendant-Appellee, Omaha Development Foundation ("ODF"), a Nebraska non-profit corporation, and moves the Court for an order dissolving the injunction in these proceedings dated March 1, 1989, prohibiting the demolition of the John Day Company structures (3) ("John Day Buildings"), the Wright & Wilhelmy Building "(Wright & Wilhelmy Building"), and the New Idea Building ("New Idea Building") In the alternative, ODF moves the Court to require the Plaintiffs and Intervenor, as a condition for the continuation of such injunction, to file a bond as hereinafter described pursuant to Rule 8(b) of the Federal Rules of Appellate Procedure in favor of ODF to cover the damages which

ODF will sustain as a result of the issuance and continuation of the injunction. In support of this Motion, ODF states as follows:

1. ODF is a Nebraska non-profit corporation which was formed in 1980 and for the past nine years has been engaged generally in community development programs and activities in the Omaha, Nebraska, metropolitan area. For the past two years, ODF has specifically been involved in the development of the Riverfront Area of the City of Omaha. In this regard, ODF has been involved in implementing the Riverfront Development Plan ("Riverfront Development Plan") for the construction of the Riverfront Redevelopment Project (the "Project") described in the Plaintiffs' Complaint herein. The Project provides for the redevelopment of an area of downtown Omaha bounded roughly by Tenth Street on the West, the Missouri River on the East, Douglas Street on the North, and Leavenworth Street on the South, but does not encompass any of that area currently included in the area of downtown Omaha commonly referred to as the Central Park Mall. As part of the Project, ODF acquired the twenty-two buildings in Jobbers Canyon and is the property owner most directly affected by the injunction herein. Of the twenty-two buildings in Jobbers Canyon, all but five have been completely demolished or are substantially demolished beyond the point of repair. Of the total floor space originally in Jobbers Canyon, less than twelve percent (12%) remains to be demolished. Photographs taken on March 22 and 24, 1989, showing the present condition of the Project and a scale model of the finished Project are attached hereto marked Exhibit A.

2. With respect to the remaining buildings in Jobbers Canyon, namely, John Day Buildings, Wright & Wilhelmy Building and New Idea Building, all of which are now the property of ODF and which were purchased by ODF for development purposes, ODF states as follows:

John Day Buildings.

ODF was originally advised that the former owners and occupants of the John Day Buildings would vacate the John Day Buildings on or about May 21, 1989. Based on this information, ODF previously advised the District Court that demolition of the John Day Buildings would commence on or about May 21, 1989, or sooner if the buildings became available. As shown in the attached notice marked Exhibit B, the former owners and occupants of the John Day Buildings have vacated the south building effective as of March 22, 1989, and further have advised ODF that they will vacate the two north buildings on or before April 10. Thus, the south John Day Building is available for demolition immediately, and the remaining two north John Day Buildings will become available for demolition on April 10, 1989.

ODF must commence demolition of the John Day Buildings as soon as possible. In this regard, the John Day Buildings and the John Deere Warehouse share a common wall which must be removed to complete demolition of the John Deere Warehouse. In its present, partially demolished condition, the John Deere Warehouse Wall which stands eight stories in height presents a clear danger from falling debris or collapse, and should be removed as quickly as possible. ODF anticipates that the John Deere Warehouse Wall will be removed on or before

April 2, 1989. Following the removal of the wall, the shed type roof enclosing the alley and parking space between the John Deere Warehouse Wall and the John Day Buildings will be exposed on the east side and supported by temporary supports so that it should be removed as quickly as possible to avoid any additional danger from collapse or vandalism.

Prior to the filing of the appeal herein and at the present time, ODF was and is in active negotiations with four potential hotel developers for this site of the John Day Buildings. ODF has advised all of these developers that the site would be cleared and available for their construction this summer. Any delay in the demolition of these buildings will have a material impact on the ongoing negotiations which ODF has with these developers and will substantially reduce potential ODF demolition and landscaping cost savings by precluding hotel development on this site in this construction year. These savings, estimated to be $350,000.00, include the costs which would be saved if the site were immediately turned over for development so as to avoid the expense of filling and landscaping the excavation site. Any delay in the hotel which is planned and needed as part of the Project will cause ODF extreme financial hardship in the recovery of its investment in the Riverfront Project, and an extended delay will cause ODF's bankruptcy. Also, any delay will adversely affect the negotiations on the hotel site due to the announced policy of the Board of Governors of the Federal Reserve Board to increase interest rates.

Furthermore, the completion of the hotel project by ODF is necessary to reduce ODF's interest expense to the Peter Kiewit Foundation which is $60,000.00 per year for the portion of the loan allocable to the hotel site. Also, the

proceeds from the successful, timely completion of the hotel project will reduce ODF's $2,700,000.00 loan from First National Bank which is subject to an annual interest charge of 8.5% or $230,000.00 per year. The minimum additional interest expense of ODF resulting from the loss of the 1989 construction season for one year is a total of $290,000.00.

B. Wright & Wilhelmy Building

The demolition of the Wright & Wilhelmy Building must be commenced on or before May 21, 1989, to permit required utility relocations and the reconstruction of Jackson and Jones Streets between Ninth and Tenth Streets. The Jackson-Ninth to Tenth Street segment is needed to provide reasonable access to the Union Pacific Railroad Dispatching Facility, as well as the various Union Pacific Railroad and ConAgra employee parking areas located south of Jones Street. This access must be available upon occupancy of both the Union Pacific Railroad and the ConAgra Buildings which will occur during the spring and summer of 1989. A delay in the demolition of the Wright & Wilhelmy Building beyond May 21, 1989, will result in the inability of Union Pacific Railroad Company and Conagra to reasonably occupy their buildings and will substantially increase demolition costs, which increase is estimated to be $110,550.00 for premium overtime rates and lost salvage rights to attempt a complete demolition in a timely manner.

C. New Idea Building

To secure possession of the New Idea Building, prior to the issuance of the injunction herein, ODF terminated all tenants' leases in the

New Idea Building and the related rental payments of $6,000.00 per month. For the same reason, ODF paid $48,000.00 to tenants of the New Idea Building to obtain early terminations of existing, fixed term lease agreements. As a result of the injunction in the proceedings, ODF has been and will continue to be deprived of the early possession of the New Idea Building which it sought and for which it paid. Thus, as a result of the foregoing, ODF has sustained damages in the amount of $48,000.00 plus $6,000.00 per month for each month that the injunction continues.

At the present time, it is anticipated that the former owners, occupants and tenants of the New Idea Building will complete the removal and salvage of their property from the interior of the premises and completely vacate the premises on April 1, 1989. Under the terms of ODF's purchase agreement for the New Idea Building, the former owners of the building also reserved the right to remove and salvage the exterior windows, doors and roof hatches, and the former owners plan to complete such exterior work prior to May 1, 1989. Any interference with the former owners' salvage rights to the New Idea Building will obligate ODF to reimburse such former owners for the value of such lost salvage rights. In this regard, the total salvage rights are valued in the purchase contract for the New Idea Building for $150,000.00

Accordingly, the New Idea Building will be available for demolition on May 1, 1989. The demolition of the New Idea Building, which is immediately adjacent to the Wright & Wilhelmy Building, must commence on or before May 1, 1989, for the same reasons as are set forth above in subsection B. Any delay in the demolition of the New Idea Building will create, in addition to the problems and increased expenses described

in this subsection, the same problems and cause ODF the same increased expenses as are described above in subsection B.

3. In addition to the foregoing factors, generally any delay in demolition will cause ODF to be the owner of several vacant, older buildings, and such structures have historically presented an invitation for vandalism, unauthorized entry and fire. This situation creates a potential safety hazard, as well as an unacceptable liability and property damage exposure for ODF, with increased annual insurance premiums of approximately $40,000.00.

4. The injunction which was entered by the Court herein on March 1, 1989, was based upon the express representation of the Appellants that they were unable to post a bond of any kind, and this representation was made a part of the Order for Injunction. Contrary to the representation of the Appellants, as shown by the attached financial report for the National Trust for Historic Preservation marked Exhibit C, Intervenor-Appellant National Trust for Historic Preservation has assets in excess of $48,000,000.00, and total gross annual income in excess of $22,000,000.00. In 1989, the National Trust for Historic Preservation received federal funding in excess of $4,000,000.00. Furthermore, as Judge Kopf found at pages 30 to 32 of his opinion, a separate Appellant Mercer Management Company has property holdings in the Old Market area and substantial management contracts in the Old Market area. Thus, contrary to their prior representations, Appellants have sufficient assets to post a bond in accordance with Rule 8(b) of the Federal Rules of Appellate Procedure.

5. For ease of reference, ODF sets forth the following authorities as part of this Motion in lieu of a separate memorandum. In *DataPhase Systems, Inc., v. C. L. Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981), the traditional standards for interim injunctive relief are summarized as follows:

> Whether a preliminary injunction should issue involves a consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between the harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

6. With respect to Appellant's probability of success on the merits, the claims of the Plaintiffs and Intervenor have been thoroughly considered by two different judges (Magistrate Kopf and Judge Urbom) who together have made six separate rulings on these claims (Judge Urbom's Memorandum and Order on Motions for Temporary Restraining Order and Preliminary Injunction dated April 13, 1988, Filing No. 26; Magistrate's Findings and Recommendations dated July 28, 1988, Filing No. 261; Magistrate's Findings and Recommendations dated January 20, 1989, Filing No. 468; Judge Urbom's Memorandum and Order dated December 30, 1988, Filing No. 448; Judge Urbom's Memorandum and Order on Plaintiffs' and Intervenor's Objections to the Magistrate's Findings of Law and Fact and their Motion to Reject Part of the Magistrate's Recommendations dated February 14, 1989, Filing No. 485; and, Judge Urbom's Memorandum and Order on Motion for Stay dated February 22, 1989, Filing No. 492). In all of these considerations, both Judges determined that there was no federal involvement in the Riverfront

Redevelopment Project and that there was no merit to the Plaintiffs' and Intervenor's claims. Copies of the foregoing opinions are submitted with this Motion for the convenience of the Court. In view of the prior, detailed rulings against the Plaintiffs and Intervenor, ODF submits Appellants cannot demonstrate a probability of success on the merits.

7. Moreover the continuation of the injunction dated March 1, 1989, has caused and will continue to cause ODF substantial damages as previously described. Accordingly, ODF submits that the injunction should be dissolved. In the alternative, ODF submits that Appellants should be required to post a sufficient surety bond in the amount of $1,000,000.00 in favor of ODF in accordance with Rule 8(b) of the Federal Rules of Appellate Procedure.

WHEREFORE, ODF moves the Court to dissolve the prior injunction entered in these proceedings on March 1, 1989, and to specifically dissolve the injunction relating to the roof covering the alley and parking space between the John Deere Warehouse and the John Day Buildings. In the alternative ODF moves the Court to require the Appellants to post a surety bond in the amount of $1,000,000.00 to cover ODF's damages in accordance with the provisions of Rule 8(b) of the Federal Rules of Appellate Procedure.

OMAHA DEVELOPMENT
FOUNDATION,
a Nebraska non-profit corporation,
Defendant-Appellee,

By: Frank F. Pospishil
Frank F. Pospishil

of Abrahams, Kaslow & Cassman
8712 West Dodge Road, #300
Omaha, NE 68114
Telephone: (402) 391-1250
Its Attorneys

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

Michael C. Wiese, being first duly sworn on oath, deposes and states that (1) he is the Executive Director of Defendant Omaha Development Foundation, a Nebraska non profit corporation, Defendant-Appellee herein; (2) he is personally in charge of the Riverfront Project on behalf of ODF, including the acquisition and demolition of the buildings in Jobbers Canyon; (3) he has read the foregoing motion; (4) he has personal knowledge of the facts set forth therein; and (5) such facts are true.

/s/ Michael C. Wiese
Michael C. Wiese

SUBSCRIBED and sworn to before me this 28th day of March, 1989.

/s/ Jessie Ellen Riggs
Notary Public

My Commission Expires:

GENERAL NOTARY - State of Nebraska
JESSIE ELLEN RIGGS
My Comm. Exp. April 27, 1992

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing pleading was served on each of the

attorneys in this litigation by mailing a copy of same, by regular United States mail, postage prepaid, on the 28 day of March, 1989, addressed as follows:

John E. North
Suite 1100
One Central Park Plaza
Omaha, NE 68102

Steven E. Achelpohl
Schumacher & Achelpohl
1823 Harney Street,
Suite 100
Omaha, NE 68102

Elizabeth S. Merritt
Assistant General Counsel
National Trust for Historic Preservation
1785 Massachusetts Avenue, N.W.
Washington, D.C.20036

Elizabeth Ann Peterson
Attorney at Law
Department of Justice
P.O. Box 23795
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700 Service Life Building
1904 Farnam Street
Omaha, NE 68102

Dorthy M. Tubach
10828 Old Mill Road, #6
Omaha, NE 68154

/s/ Frank F. Pospishil
Frank F. Pospishil

PHOTO OF JOBBERS CANYON LOOKING SOUTH FROM FARNAM STREET TAKEN MARCH 22, 1989

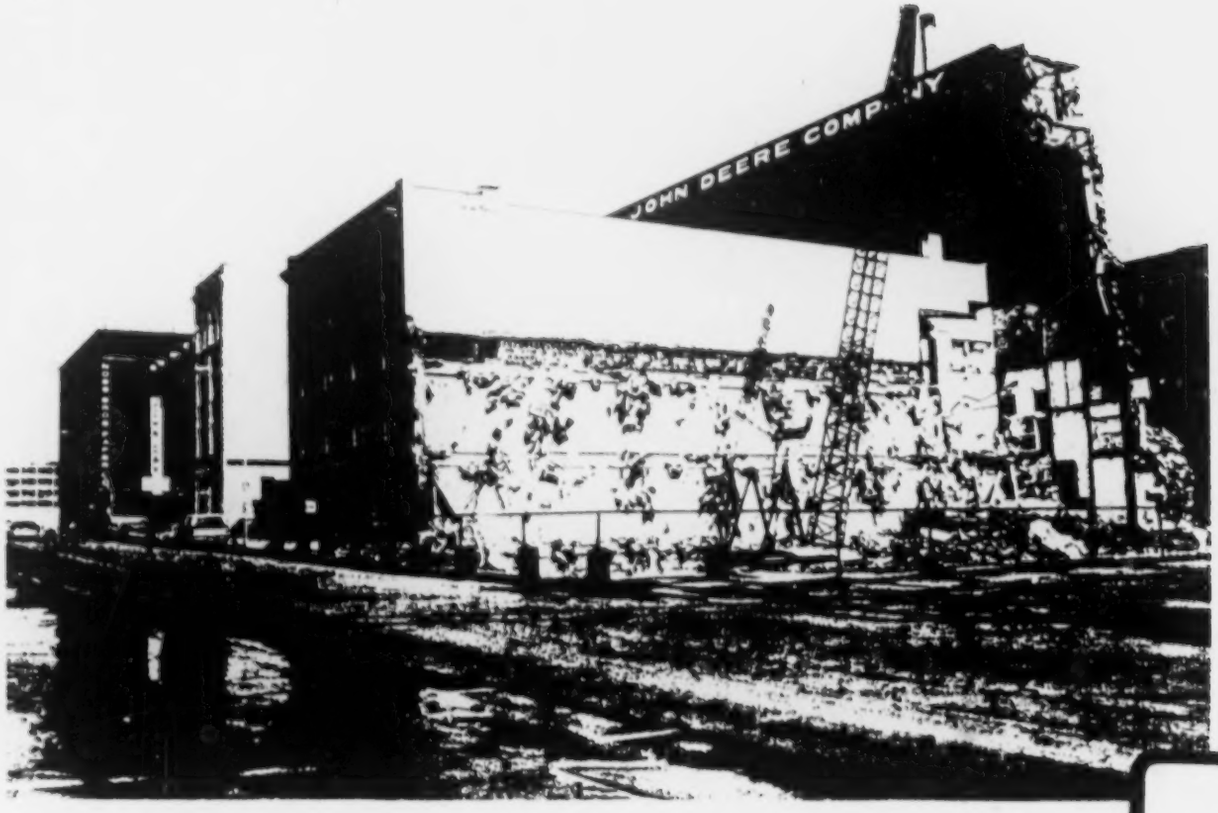

PHOTO OF JOHN DAY BUILDINGS AND ADJOINING JOHN DEERE COMPANY WALL TAKEN ON MARCH 22, 1989

EXHIBIT
A

AERIAL PHOTO TAKEN ON FEBRUARY 20, 1989, FROM THE SOUTHEAST CORNER OF THE PROJECT LOOKING TO THE NORTHWEST

SCALE MODEL OF THE COMPLETED PROJECT LOOKING FROM THE NORTHWEST TO THE SOUTHEAST

EXHIBIT B

JOHN DAY COMPANY

Since 1909

P.O. Box 3541 • Omaha, Nebraska 68103 • Phone (402) 344-4123 • Fax No. 402-344-7243

March 22, 1989

Address Reply to
Omaha

Mr. Michael C. Wiese
Executive Director
Omaha Development Foundation
1301 Harney Street
Omaha, Nebraska 68102

Dear Mike:

In accordance with Section 8.5 of our closed Option Agreement, John Day Company may remain in possession of the property at 401 South 10th Street (Lots 3, 4 & 5, Block 153, Original City of Omaha) until May 1, 1989. However, relocation to our new facility is ahead of this schedule and, in accordance with our agreement, we intend to terminate our occupancy prior to May 1, 1989.

Therefore, please accept this letter as our notice to you that the John Day Company plans to deliver exclusive possession of the property to the Omaha Development Foundation as follows:

A. The south building (Lot 5, Block 153) upon receipt of this notice.

B. The north building (Lots 3 & 4, Block 153) on April 10, 1989.

Please let me know if there is anything we need to do to coordinate utility disconnections. Utilities have been notified on south building.

Sincerely,

JOHN DAY COMPANY

/s/ Jere W. Fonda
Jere W. Fonda
President

JWF:vlr

cc: Tyler Gaines
John Fonda
Matt Fonda

EXHIBIT C

NATIONAL TRUST FOR HISTORIC PRESERVATION
1987 ANNUAL REPORT

National Trust for Historic Preservation: Financial Statements

Balance Sheets

	September 30 1987	1986
Current assets:		
Cash and cash equivalents including donations for specific purposes of $1,327,752 in 1987 and $1,135,525 in 1986	$ 5,158,597	$ 4,670,170
Grants receivable	114,826	41,453
Other accounts receivable	1,708,155	1,291,701
Merchandise inventory	615,372	577,527
Prepaid expenses and other	597,006	452,360
Total current assets	8,193,956	7,033,211
Investments, at market (Notes 1, 4, and 5):		
National Preservation Loan Fund	2,857,588	2,953,353
Inner-City Ventures Fund	2,332,198	1,915,546
Endowments and similar funds	30,032,431	24,400,886
Total investments	35,222,217	29,269,785
Historic properties (Note 2)		
Property and equipment, at cost (Note 6):		
Headquarters, including land of $812,965 in 1987 and 1986	5,930,006	5,725,061
Fixtues, equipment and vehicles	1,535,464	1,015,979
	7,465,470	6,741,040
Less accumulated depreciation	2,658,088	2,217,120
Total property and equipment	4,807,382	4,523,920
Other assets	715,072	950,704
Total assets	$48,938,627	$41,777,620

	September 30 1987	1986
Current liabilities:		
Accounts payable	$ 1,191,524	$ 1,538,097
Accrued expenses	1,089,679	1,310,756
Donations for specific purposes	1,327,752	1,135,525
Current portion of long-term debt (Note 7)	11,500	93,340
Deferred income	1,969,526	1,973,706
Total current liabilities	5,589,981	6,051,424
Long-term debt (Note 7)	1,038,000	549,500
Other liabilities	92,236	112,909
Total liabilities	6,720,217	6,713,833
Fund balances:		
Revolving funds (Notes 4 and 5)	4,084,949	4,180,559
Endowments and similar funds (Notes 1 and 4)		
Endowments	18,832,027	14,937,686
Quasi-endowments	11,200,404	9,463,200
Total endowments and similar funds	30,032,431	24,400,886
Unrestricted		
Net investment in property and equipment (Note 6)	4,807,382	4,523,920
Designated by Trustees	1,555,776	880,524
Cumulative excess of support and revenues over expenses	1,737,872	1,077,898
Total unrestricted	8,101,030	6,482,342
Total fund balances	42,218,410	35,063,787
Commitments (Note 6)		
Total liabilities and fund balances	$48,938,627	$41,777,620

ION

	September 30 1987	1986
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Commitments (Note 6)		
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Statement of Support, Revenues and Expenses

	Year ended September 30 1987	1986*
Operating support and revenues:		
Grant income	$ 4,913,870	$ 5,203,495
Donations (Note 1)	6,247,073	5,505,886
Membership dues (Note 1)	2,964,323	3,050,799
Admissions and special events	1,912,173	1,628,434
Investment income	1,502,011	1,495,046
Contract services	1,316,403	1,216,206
Sales of articles	1,210,239	1,112,275
Sales of property (Note 2)	916,696	1,047,721
Advertising	724,711	596,841
Rental income, net of related expenses (Note 6)	320,720	364,147
Miscellaneous	717,154	909,996
Total operating support and revenues	22,765,373	22,130,846
Operating expenses (Notes 1 and 2):		
Program services:		
Historic properties	5,459,977	5,678,691
Preservation services	5,419,963	5,350,025
Publications	2,550,813	2,435,080
Education	1,793,429	2,031,383
Total program services	15,224,182	15,495,179
Supporting services:		
Membership development	1,951,698	1,643,348
General and administration	1,785,761	1,679,646
Fund raising	1,734,579	1,709,351
Total supporting services	5,472,038	5,032,345
Total operating expenses	20,696,220	20,527,524
Excess of operating support and revenues over operating expenses	$ 2,069,153	$ 1,603,322

*Reclassified for comparative purposes.

Statements of Changes in Fund Balances

	Revolving funds	*Endowments and similar funds*	*Unrestricted*	*Total*
Balance at September 30, 1985	$4,100,233	$20,476,925	$5,642,952	$30,220,110
Additions (deductions) during the year:				
Excess of support and revenues over expenses			1,603,322	1,603,322
Donations, net	256,050	553,266		809,316
Investment income, net	363,408			363,408
Bowlingly endowment – donated to the Trust		(183,694)		(183,694)
Realized and unrealized gains, net		2,804,912		2,804,912
Expenses	(539,132)	(14,455)		(553,587)
Transfers, net		763,932	(763,932)	
	80,326	3,923,961	839,390	4,843,677
Balance at September 30, 1986	4,180,559	24,400,886	6,482,342	35,063,787
Additions (deductions) during the year:				
Excess of support and revenues over expenses			2,069,153	2,069,153
Donations, net	116,000	122,920		238,920
Investment income, net	281,170			281,170
Realized and unrealized gains, net		5,081,611		5,081,611
Expenses	(492,780)	(23,451)		(516,231)
Transfers, net		450,465	(450,465)	
	(95,610)	5,631,545	1,618,688	7,154,623
Balance at September 30, 1987	$4,084,949	$30,032,431	$8,101,030	$42,218,410

Statements of Changes in Financial Position

	Year ended September 30 1987	1986
Sources of working capital:		
Excess of support and revenues over expenses	$2,069,153	$1,603,322
Add depreciation not affecting working capital	440,968	386,342
Working capital provided by operations	2,510,121	1,989,664
Decrease in other assets	235,632	
Increase in long-term debt and other liabilities	467,827	403,447
Increase in revoling funds and endowments and similar funds, net	5,085,470	3,240,355
Total sources	8,299,050	5,633,466
Uses of working capital:		
Increase in investments	5,952,432	4,337,623
Property and equipment additions, net	724,430	200,587
Increase in other assets		486,753
Total uses	6,676,862	5,024,963
Increase in working capital	$1,622,188	$ 608,503
Changes in components of working capital:		
Increase (decrease) in working capital:		
Cash and cash equivalents	$ 488,427	$1,651,133
Grants receivable	73,373	(5,568)
Other accounts receivable	416,454	120,538
Merchandise inventory	37,845	32,385
Prepaid expenses and other	144,646	(5,798)
Accounts payable	346,573	(258,109)
Accrued expenses	221,077	(718,813)
Donations for specific purposes	(192,227)	971
Current portion of long-term debt	81,840	81,828
Deferred income	4,180	(290,064)
Increase in working capital	$1,622,188	$ 608,503

Statement of Functional Expenses for the Year Ended September 30, 1987 with Comparative Totals for 1986

	Program Services				
	Historic properties	*Preservation services*	*Publications*	*Education*	*T pro se*
Employee costs:					
Salaries	$2,014,779	$2,326,341	$ 540,480	$ 611,302	$ 3
Payroll taxes and benefits	339,463	505,923	98,369	120,525	
	2,354,242	2,832,264	638,849	731,827	
Professional services	241,912	560,097	123,655	124,258	
Travel and representation	88,966	491,480	43,752	137,933	
Office supplies and expenses	83,443	133,432	50,491	42,666	
Printing and related expenses	166,111	251,450	962,029	145,376	
Postage and mailing	40,647	113,314	440,957	51,922	
Telephone and telegraph	103,603	131,512	42,730	35,261	
Reference materials	15,754	15,122	11,940	8,057	
Occupancy	315,571	429,553	74,317	98,958	
Maintenance	470,272			57,052	
Real estate management	485,603				
Grants and awards	12,234	360,262		5,500	
Cost of merchandise sold	243,942		25,251	209,458	
Property development	464,511				
Insurance	173,208	8,224		3,704	
Miscellaneous	199,958	93,253	136,842	141,457	
	3,105,735	2,587,699	1,911,964	1,061,602	
	$5,459,977	$5,419,963	$2,550,813	$1,793,429	$1

tal ram ices	Supporting Services				Total Expenses	
	Membership development	General and administration	Fund raising	Total supporting services	1987	1986
492,902	$ 374,538	$ 946,166	$ 615,620	$1,936,324	$ 7,429,226	$ 7,289,15
064,280	76,182	200,531	124,911	401,624	1,465,904	1,125,00
557,182	450,720	1,146,697	740,531	2,337,948	8,895,130	8,414,16
049,922	125,942	186,278	498,649	810,869	1,860,791	1,901,32
762,131	21,936	98,771	96,838	217,545	979,676	958,97
310,032	51,634	116,440	28,306	196,380	506,412	409,88
524,966	574,559	13,619	127,930	716,108	2,241,074	2,185,04
646,840	578,954	24,543	43,231	646,728	1,293,568	1,243,97
313,106	34,389	55,756	38,855	129,000	442,106	473,10
50,871	3,205	10,398	6,990	20,593	71,466	74,14
918,399	81,805	126,048	86,443	294,296	1,212,695	1,128,73
527,324					527,324	288,18
485,603					485,603	410,04
377,996					377,996	454,58
478,651					478,651	433,48
464,511					464,511	1,376,25
185,136					185,136	133,75
571,510	28,554	7,211	66,806	102,571	674,081	641,86
667,000	1,500,978	639,064	994,048	3,134,090	11,801,090	12,113,36
224,182	$1,951,698	$1,785,761	$1,734,579	$5,472,038	$20,696,220	$20,527,52

Notes to Financial Statements

September 30, 1987 and 1986

Note 1 – Summary of Significant Accounting Policies

Fund Accounting

The National Trust for Historic Preservation in the United States (the Trust) is a private, nonprofit organization chartered by Congress with the responsibility to facilitate public participation in the preservation of sites, buildings and objects significant in American history and culture. The accounts of the Trust are maintained in accordance with the principles of fund accounting. Under fund accounting resources for various purposes are classified for accounting and reporting purposes into funds established according to their nature and purpose.

Accounting for Historic Properties

The Trust owns certain historic properties which are operated as museums or are otherwise important to the Trust in carrying out is preservation programs. Certain other properties may be held with the intent of sale. By disposing of these types of properties, the Trust has decided that the particular asset may be more productively employed in other forms of investments which will generate additional support for the programs of the Trust. Historic properties have been acquired by the Trust through gift, bequest, purchase and other means. In addition, the Trust has remainder interests in several other properties.

The Trust follows the accounting practice of not including in its assets the cost or appraised value of any of its

historic properties which upon receipt may be retained by the Trust. Related expenditures for restoration, stabilization, reconstruction and development are charged to expense as incurred. Properties accepted with the intent of sale are recognized as income at the time of sale. The following historic properties, including objects and furnishings, are owned by the Trust and are not recorded in the accounts under the accounting policy stated above:

Historic House Museums

Belle Grove, Middletown, Virginia*
Chesterwood, Stockbridge, Massachusetts
Cliveden, Philadelphia, Pennsylvania*
Cooper-Molera Adobe, Monterey, California*
Decatur House, Washington, D.C.
Drayton Hall, Charleston, South Carolina
Filoli, Woodside, California*
Frank Lloyd Wright Home and Studio, Oak Park, Illinois*
Lyndhurst, Tarrytown, New York
Montpelier, Montpelier Station, Virginia
Oatlands, Leesburg, Virginia*
Pope-Leighey House, Mount Vernon, Virginia
Shadows-on-the-Teche, New Iberia, Louisiana
Woodlawn Plantation, Mount Vernon, Virginia
Woodrow Wilson House, Washington, D.C.

Non-Museum Properties

Aiken House, Charleston, South Carolina
Brucemore, Cedar Rapids, Iowa*
Casa Amesti, Monterey, California*
Reynolds Tavern, Annapolis, Maryland*

The above properties are important to the Trust in carrying out its preservation programs and the Trust intends to retain them so long as economically feasible. Those which are museums are operated for public benefit and to the highest recognized professional standards. Several of the historic properties listed above are managed for the Trust by local nonprofit preservation organizations, government entities, or other groups under various cooperative arrangements as indicated by an asterisk above.

Merchandise Inventory

Inventory is stated at the lower of cost or market, cost being determined on the first-in, first-out basis.

Investments

Investments are carried at market value, which is considered to equal cost of quoted market prices are not available. Income is recognized from interest and dividends as earned. The Trust maintains master investment accounts for its endowment and quasi-endowment funds. Realized and unrealized gains and losses from securities in the master investment accounts are allocated monthly to the individual endowments based on the relationship of the market value for each endowment or quasi-endowment to the total market value of the master investment accounts, as adjusted for additions to or deductions from these accounts.

Endowment and Similar Funds

The Trust has certain endowments and quasi-endowments that have been donated over the years to provide income for general operating purposes of the Trust and for preservation and maintenance of designated historic properties. Endowment funds are those in which the donor has stipulated that the principal is to be maintained in perpetuity and only the income from the investments of the fund may be expended. Quasi-endowments are those funds which operate as endowments, but the Board of Trustees has the right to decide at any time to expend the principal of such funds. In 1987 and 1986, the Board of Trustees transferred $450,465 and $763,932, respectively, of income from unrestricted equity to quasi-endowment.

Grant Income

Amounts received from grants (principally U.S. Government) and donations received for specific purposes are recognized as income to the extent of related expenses incurred for grant and donation purposes.

Membership Dues and Donations

Income from membership dues is recognized over the period to which the dues relate. The Trust receives advance payments for memberships which are principally for a period of one year. These advance payments are deferred and recognized ratably as membership revenue over the related contract term. Beginning in fiscal year 1987, the Trust changed its method of accounting for

donations which are received together with membership dues to recognize such payments as donation income upon receipt.

Previously, these donations were deferred and amortized in the same proportion as the related membership dues and recorded as membership income. This change in accounting for donations which are received together with membership dues was applied prospectively as required by Accounting Principles Board Opinion No. 20. "Accounting Changes" and had the effect of increasing total revenue in fiscal year 1987 by approximately $474,000. The total reclassification from membership income to donation income was approximately $893,000.

Depreciation

Depreciation of fixtures, equipment and vehicles is computed on the straight-line basis over useful lives of five to ten years. The headquarters building is being depreciated over thirty years on the straight-line basis.

Functional Allocation of Expenses

The costs of providing various programs and other activities have been summarized on a functional basis in the statements of support, revenues and expenses and in the statements of functional expenses. Accordingly, certain costs have been allocated among the programs and supporting services benefited.

Income Tax Status

The Trust is a 501(c)(3) organization exempt from income tax as provided under section 501(a) of the Internal

Revenue Code. Income from certain Trust activities not directly related to its tax-exempt purpose is subject to income tax. At September 30, 1987, the Trust had unused operating loss carry forwards relating to these activities of approximately $252,000 which may be applied against future taxable income expiring in various years from 1993 to 2001.

Note 2 – Property Transactions

As discussed in Note 1, the Trust acquires certain historic properties through gift, bequest, purchase and other means. The following summarizes the significant transactions affecting historic properties owned by the Trust for the fiscal years 1987 and 1986:

Pocantico Hills

In January 1979, the Trust was bequeathed a one-quarter undivided interest owned by Nelson A. Rockefeller in the 250-acre Rockefeller family estate in Pocantico Hills, New York (a National Historic Landmark). Effective December 7, 1983, the Trust became the sole owner of an 86-acre parcel within the estate in exchange for its undivided one-quarter interest. The Trust's parcel includes the Rockefeller family home, Kykuit and several other significant structures. On the same date, the Trust's parcel was leased to David and Laurance S. Rockefeller for their private use under an agreement by which they, in addition to rents, will continue to pay all maintenance and capital expenses of the property and all other expenses of its operation during the term of the lease. Subject to

certain conditions, as defined, the lease term expires January 31, 1988. No amounts have been recorded in the financial statements for this bequest or for expenses related to this property which were paid in behalf of the Trust by the Rockefellers.

In October 1986, the Trust submitted to the Rockefellers a plan for the future operation of the Trust's parcel for limited public visitation and other charitable and private purposes. Under this plan, restoration and maintenance of the property and certain other expenses would be paid by the Rockefellers through an endowment fund and other sources. In May 1987, the Rockefellers made a counterproposal in which the Trust would deed its 53-acre parcel to Rockefeller University, subject to a preservation easement requiring the University to maintain the parcel's historic qualities and permit public visitation at a future time. The Rockefeller family would provide the Trust with an unrestricted grant and would purchase the non-historic portion of the parcel, approximately 33 acres, for an amount to be negotiated. The counterproposal is currently under consideration by the Trust. If an agreement is not reached, the Rockefellers are required to purchase the life interest in the Trust's Pocantico parcel and have an option to purchase the Trust's remainder interest at its fair market value, under the terms of a 1983 agreement between the parties.

Montpelier

In October 1984, the Trust acquired Montpelier, a 2,677-acre estate in Orange County, Virginia, the home of James Madison. Mrs. Marion dePont Scott made a $10 million

bequest to the Trust for the purpose of acquiring and operating Montpelier as an historic shrine. Upon receipt of the $10 million bequest, the Trust acquired the estate through payment of $7.7 million to Mrs. Scott's five nieces and nephews who jointly owned the property following her death. The endowment for the property, after payment to the duPont heirs and expenses related to certain litigation over Mrs. Scott's bequest, is not sufficient to maintain it in perpetuity. In March 1987, the Trust opened Montpelier to public visitation. In addition to admission fees and donations. Montpelier received income from timber sales, rentals, interest and special events. The Trust is seeking additional funding for the Montpelier property and has formed a foundation for that purpose.

Sale of Property

During fiscal year 1987, three properties which had been held for sale were sold for $394,789. An additional $531,907 was received from the sale of the contents of a house and from the sale of rare collectibles. The net proceeds from the properties, the contents of the house and the collectibles were recorded as unrestricted income, net of related expenses, for a total of $926,696. These property transactions are listed below:

In fiscal year 1986, the Trust received a house and property in Georgetown, Washington, D.C. In January 1987, the property was sold with net proceeds to the Trust of $206,108.

In fiscal year 1985, the Trust received a house and property in Westbrook, Connecticut. In May 1987, the property

was sold with restrictive covenants for the net proceeds of $163,798.

In fiscal year 1987, a property contiguous to the Bowlingly estate in Queenstown, Maryland, called "Kenworthy Sliver," was donated to the Trust. Its sale provided net proceeds to the Trust of $24,883.

In March 1987, the Trust received $275,000 from the sale of a rare collectible which had been purchased by the Decatur House Council in 1969. The proceeds were used to establish a new Collections Fund for the Decatur House in the amount of $125,000 and to repay the borrowing from the Decatur House endowment used to fund the construction of the Decatur Carriage House.

In 1982, the Trust was given a remainder interest in a Charles Town, West Virginia residence in which the donor retained a life estate. In the donor's will the Trust was also named as the recipient of the property's contents. In January 1987, the donor died and the tangible personal property from the house was sold for $256,907, net of related expenses. A contract for the sale of the house and property was entered into with restrictive covenants for $283,000. It is anticipated that this sale will be finalized in fiscal year 1988.

Note 3 – Description of Program and Supporting Services

Description of the program and supporting services in the accompanying financial statements is as follows:

Publications

Fosters knowledge, stimulates interest and facilitates participation in public and private historic preservation through the printing and publication of the Trust's general materials, newspaper, and magazine and the administration of the book publishing program.

Education

Encourages an understanding of all aspects of preservation and the development of related skills through such programs as providing essential restoration trade skills, identifying and nurturing target audiences (including the media) for communication, merchandising, preservation-related products and offering legal information for the protection of historic districts and landmarks.

Included in education expenses are donated public service announcements which totaled $3,760 and $42,449 in 1987 and 1986, respectively. A corresponding amount is also recognized as revenue.

Historic Properties

Preserves and manages for public benefit the Trust's property, real and personal, and administers the programs for the preservation of endangered and other historic properties nationwide.

Preservation Services

Provides (1) information and technical assistance to the Trust's members, private and public organizations and

governmental bodies with respect to contemporary preservation issues, including maritime preservation, (2) financial assistance to member organizations to facilitate preservation education programs, conferences, and the retention of professional consultants, and (3) the oversight and administration of six regional offices to act as the Trust's primary local liaison for onsite visits, consultation and advisory assistance.

Membership Development

Encompasses the identification, cultivation and expansion of the Trust's membership as the primary effort to promote preservation awareness and to increase public involvement in preservation activities.

General and Administration

Includes the functions necessary to maintain an equitable employment program, assure an adequate working environment, provide coordination and articulation of the Trust's program strategy through the Office of the President; secure proper administrative functioning of the Board of Trustees and Board of Advisors, and manage the financial and budgetary responsibilities of the Trust, provide legal advice to the Board of Trustees and the management of the Trust and corporate legal services to the Trust's programs and offices, maintain a litigation program on nationally significant preservation issues, and provide legislative services, policy research and educational programs through the Center for Preservation Policy Studies.

Fund Raising

Provides the structure necessary to encourage and secure private financial support from individuals, foundations and corporations.

Insert Note 4 – Investments chart

Note 4 – Investments

The composition of investments owned by the Trust at September 30, 1987 and 1986 are presented below.

September 30, 1987	*National Preservation Loan Fund*	*Inner-City Ventures Funds*	*Endowments and Similar Funds*	*Total*
Cash and cash equivalents	$2,060,961	$2,061,315	$ 2,138,331	$ 6,260,607
Notes receivable	796,627	270,883	194,335	1,261,845
Master investment account			27,699,765	27,699,765
	$2,857,588	$2,332,198	$30,032,431	$35,222,217
September 30, 1986				
Cash and cash equivalents	$2,343,069	$1,632,427	$ 2,168,893	$ 6,144,389
Notes receivable	610,284	283,119	455,882	1,349,285
Master investment account			21,776,111	21,776,111
	$2,953,353	$1,915,546	$24,400,886	$29,269,785

As of September 30, 1987, grant and loan commitments for the National Preservation Loan Fund and Inner-City Ventures Fund were $948,000 and $1,553,000, respectively.

The cost of total investments was approximately $31,662,059 and $27,811,665 at September 30, 1987 and 1986, respectively. The unrealized and realized components of the gains related to investments are presented below:

	September 30	
	1987	*1986*
Unrealized net gain	$1,985,592	$ 561,188
Realized net gain	3,096,019	2,243,724
Total realized and unrealized net gain	$5,081,611	$2,804,912

As a result of the decline in the stock market which occurred in October 1987, the market value of the investments owned by the Trust decreased by approximately $4,980,000.

Note 5 – Revolving Loan Funds

The revolving loan funds of the Trust were established to provide assistance in the preservation of historic properties. This assistance is provided primarily through low-interest loans to various preservation organizations and individuals; however, grants are also made for projects with no provision for repayment to the Trust. Such grant activity is reflected as income and expense in the Statement of Support, Revenue and Expenses. Organizations repay Trust loans from sales, rentals, interest income and fund raising.

National Preservation Loan Fund

The National Preservation Loan Fund (NPLF) provides low-interest loans, loan guarantees, interest subsidies, and in special circumstances, grants, and technical assistance to help organizations with the creation or expansion of preservation revolving funds and with preservation development projects for historic buildings, sites and districts. A special endangered properties component of the NPLF provides financial assistance to help preserve endangered National Historic Landmarks.

NPLF assistance can be used for acquisition, rehabilitation and related capital costs for projects involving historic properties. NPLF money must be matched with local capital.

The maximum loan is $100,000 and the term is no more than five years. Interest rates range from 5% to 8%. Certain loans are unsecured. Grants made out of the NPLF totaled $15,000 and $63,425 in 1987 and 1986, respectively.

Inner-City Ventures Fund

The Inner-City Ventures Fund (ICVF) provides a vehicle for revitalizing inner – city historic areas without displacing people. The ICVF provides low-interest loans and development expertise to neighborhood nonprofit incorporated 501(c)(3) organizations to rehabilitate buildings for housing, jobs and services for current, lower income, primarily minority residents.

ICVF assistance can be used for acquisition, rehabilitation and related capital costs for historic properties. ICVF grants range from $20,000 to $50,000. Generally, each is coupled with a low-interest loan of an equal amount. ICVF loans are made for five years or less with an interest rate ranging from 5% to 8.25%. Grants made out of ICVF totaled $54,736 and $42,489 in 1987 and 1986, respectively.

Note 6 – Property and Equipment

The Trust maintains its headquarters at 1785 Massachusetts Avenue, Washington, D.C. Approximately 22,500 and 20,500 square feet of the headquarters building's 60,500 square feet which were not occupied by the Trust during 1987 and 1986, respectively, were leased to unrelated parties for terms not exceeding five years.

The expenses of the headquarters building are allocated to the various program and supporting services of the Trust and to the leased space based on square footage. Rental income received from tenants occupying space in the headquarters building was $526,588 in 1987 and $460,818 in 1986. Related expenses, including depreciation, allocated to the leased space totaled $404,327 and

$312,388 in 1987 and 1986, respectively. Additionally, the Trust received rental income from other properties totalling $182,929 and $170,150 for 1987 and 1986, respectively. Minimum future rental income from noncancellable operating leases as of September 30, 1987 is as follows:

Year ended September 30	
1988	$ 565,557
1989	382,104
1990	130,392
1991	21,600
Later years	46,800
	$1,146,453

The Trust rents certain office space (principally for regional offices) and equipment under operating leases. Total rental expense under such leases was approximately $213,477 in 1987 and $214,000 in 1986. Minimum lease commitments on property and equipment as of September 30, 1987 are as follows:

Year ended September 30	
1988	$ 151,147
1989	143,023
1990	102,063
1991 and later years	26,232
	$ 422,465

Note 7 – Long-Term Debt

Long-term debt consists of the following:

	September 30	
	1987	*1986*
Note to the Ford Foundation payable in quarterly installments beginning in 1984 of $41,666, interest at 5%, partially secured by ICVF notes receivable		$ 83,340
Note to the Ford Foundation payable in two equal installments in May 1996 and September 1997, interest at 3%, partially secured by ICVF notes receivable	$1,000,000	500,000
Note to the James A. MacDonald Foundation payable in seven annual installments beginning December 1, 1984 through December 1, 1990 without interest	49,500	59,500
	1,049,500	642,840
Less current portion of long-term debt	[11,500]	[93,340]
	$1,038,000	$549,500

Total interest expense was $16,653 and $9,375 in 1987 and 1986, respectively.

Note 8 – Retirement Plan

The Trust terminated its non-contributory defined benefit retirement plan effective December 31, 1985 and adopted a non-contributory defined contribution plan effective January 1, 1986. The new non-contributory defined contribution plan provides benefits to all eligible employees of the Trust. Contributions are currently determined based on five percent of the eligible employees' compensation for the calendar year. Amounts charged to pension expense were $352,187 and $150,000 in fiscal years 1987 and 1986, respectively. Assets of the terminated Plan exceeded the amount necessary to satisfy all liabilities. The Board of Trustees adopted a resolution providing that one-half of the residual assets be used to provide additional benefits to participants and beneficiaries. The residual assets in excess of the assets used to provide such additional benefits, net of any administrative fees and expenses and any remaining plan liabilities, will revert to the Trust. On December 7, 1987, the remaining liabilities of the Plan were settled and the Trust received residual assets totalling approximately $834,000. Additionally, the Plan termination was approved by the Internal Revenue Service and the Pension Benefit Guarantee Corporation.

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The National Trust for Historic Preservation is the only national private, nonprofit organization chartered by Congress with the responsibility for encouraging public

participation in the preservation of sites, buildings and objects significant in American history and culture. Support for the National Trust is provided by membership dues, endowment funds, contributions and matching grants from federal agencies, including the U.S. Department of the Interior, National Park Service, under provisions of the National Historic Preservation Act of 1966. The opinions expressed in this publication are not necessarily those of the U.S. Department of the Interior.

The National Trust is an equal opportunity organization and seeks to include qualified individuals and businesses in all phases of its activity. The National Trust does not discriminate on the basis of race, color, religion, age, sex, national origin, handicap or veteran status. The Trust seeks opportunities to include these groups in its programs and activities.

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Designed by Meadows & Wiser

Typeset by Carver Photocomposition, Inc.

Printed by Wolk Press, Inc.

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(Back Cover: Maguire/Reeder, Ltd.)

December 7, 1987
To the Board of Trustees

National Trust for Historic Preservation in the United States

In our opinion, the accompanying balance sheets and the related statements of support, revenues and expenses, of changes in fund balances, of changes in financial position and of functional expenses present fairly the financial position of the National Trust for historic Preservation in the United States at September 30, 1987 and 1986, and the results of its operations and the changes in its financial position for each of the two years in the period ended September 30, 1987, and its functional expenses for the year ended September 30, 1987, in conformity with generally accepted accounting principles consistently applied during the period except for the change, with which we concur, in the method of accounting for donations received together with membership dues as described in Note 1 to the financial statements. Our examinations of these statements were made in accordance with generally

accepted auditing standards and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

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